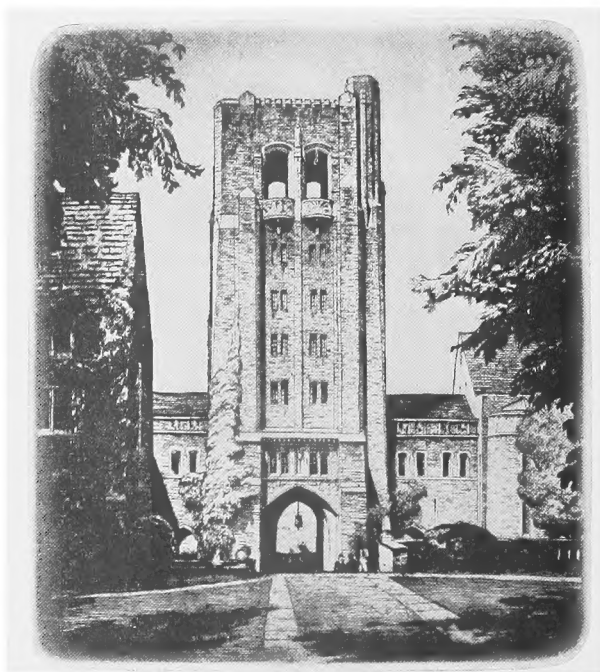


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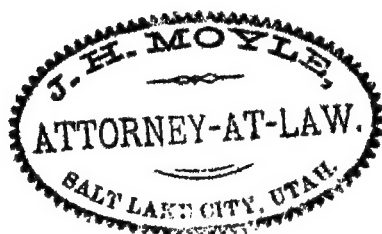
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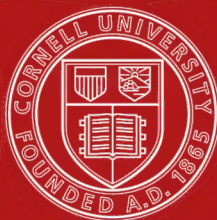
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A TREATISE  
ON  
THE LAW OF WATER RIGHTS

AS THE SAME IS FORMULATED AND APPLIED IN THE  
PACIFIC STATES, INCLUDING THE  
DOCTRINE OF

APPROPRIATION

AND THE STATUTES AND DECISIONS RELATING TO

IRRIGATION

By JOHN NORTON POMEROY, LL. D.

Author of works on Constitutional and International Law, Equity Juris  
prudence, etc.

BEING A REVISED AND ENLARGED EDITION OF "POMEROY  
ON RIPARIAN RIGHTS," WITH SEVERAL  
ADDITIONAL CHAPTERS

By HENRY CAMPBELL BLACK, M. A.

Author of "Black's Law Dictionary," and of treatises on Judgments, Tax  
Titles, Intoxicating Liquors, Constitutional Prohibitions, etc.

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## PREFACE TO THE PRESENT EDITION.

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DURING the six years which have elapsed since the publication of the first edition of this work, numerous important decisions have been rendered by the courts in the several Pacific states on the subject of "Water Rights" or some of its branches. Further, most of these communities have recently adopted statutory measures looking to the promotion and regulation of irrigation,—now the most vital question with which they have to deal,—which are as detailed in their provisions as they are novel in the history of legislation. In view of these facts, it seemed desirable to subject this book to a thorough revision, at the same time enlarging its scope to a degree corresponding with the recent developments of the subject, with the idea of making it a complete and exhaustive treatise on the general topic of "Water Rights," for use in the Pacific, northwestern, and southwestern states. To this end, the editor has carefully revised the work page by page, incorporating the results of the later decisions, together with some few cases not previously referred to. He has also added five supplementary chapters. These chapters deal with the subjects of "Irrigation and ditch companies," "Irrigation districts," "State supervision of distribution and use of water," "Riparian rights on navigable streams," and "Littoral rights." They will be found to contain full synopses of the statutes, as well as a detailed examination of the applicable authorities; and it is hoped that the inclusion of them will add considerably to the practical usefulness of the book. As the title "Riparian Rights" would no longer be accurately descriptive of the work in its enlarged form, it has been discarded, and the title "Water Rights" substituted.

H. C. B.

Washington, D. C., June 1, 1893.

LAW W. R.

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## EDITOR'S PREFACE.

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THE late Professor POMEROY, during his editorship of the *West Coast Reporter*, published in that journal a series of articles on water rights and riparian privileges in the Pacific states, which attracted much attention from the legal profession in those communities, and elicited high commendation by reason of their learning, candor, and comprehensive grasp of the subject. In consequence of the peculiarities of the law of riparian rights obtaining in California, Nevada, and the adjacent states and territories, the limited applicability of the common-law rules, the prevalence of that unique system known as the doctrine of appropriation, and the novelty and importance of the questions presented to the courts, the appearance of these articles was timely and significant, and they formed a valuable addition to the literature of the subject. The plates and copyrights of the *West Coast Reporter* having come into the ownership of the publishers of the present work, it was decided to reprint the articles in question in the form of a text-book; and they constitute the basis of the monograph now offered to the profession. It is to be regretted, for several reasons, that this undertaking could not have had the benefit of the author's own superintendence and revision; and especially because the doctrines and results of the later cases cannot, perhaps, be so harmoniously blended into the original work by a stranger's hand. But the editor has endeavored to perform this office to the best of his opportunities. Apart from the breaking of the work into chapters, and the introduction of section numbers and appropriate

head-lines, he has been scrupulous to preserve intact both the language and the arrangement of Professor POMEROY, making only such slight changes in phraseology as were rendered necessary by the altered form of publication. All the later authorities have been carefully collated, and their views and results—as also a considerable number of cases not cited by the author—have been incorporated in the work in one form or another. The general plan has been to make these interpolations in the way of additional foot-notes. But it was found that several topics of great importance were first broached by the later cases, and that points which were but imperfectly developed when the original articles were prepared had been clarified or enlarged upon. It then became necessary for the editor to write new sections; and these, being inserted in their proper connection, have added considerably to the bulk of the work. But in every instance of a new foot-note or a new section, the editor's material is to be distinguished from that of the author by the fact that it is inclosed in brackets. With a view to further facility in the use of the book, an index and a table of cases are added.

H. C. B.



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# LAW OF WATER RIGHTS.

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## CHAPTER I.

### INTRODUCTION.

- § 1. Importance of the subject—Need of legislation.
- 2. Object of the present work.
- 3. The problem stated.

#### § 1. Importance of the subject—Need of legislation.

No special branch of the law of California, Nevada, and other commonwealths of the Pacific coast, is more practically important, and none is more uncertain, unsettled, and contradictory, than that which deals with the right to appropriate or use the waters of lakes and running streams, navigable or unnavigable, and with the conflicting rights of riparian proprietors to the same waters. The whole subject imperatively demands the most careful and complete legislation, which shall define the rights of all interested parties, and establish a code of rules regulating them upon a comprehensive and just basis, entirely independent, it may be, of the common-law doctrines. The great danger is—and the danger *is* very great—lest such legislation should be enacted wholly in favor of some one interest, to the exclusion of other interests equally real, but, perhaps, not so strongly pressed upon the legislature. To prevent such unjust discrimination, which would inevitably retard, if not completely stop, the development of the most valuable and permanent natural resources of these states, the following preliminary

conditions are essential: (1) The common-law rules concerning water rights should be accurately apprehended, in order that it may be seen how far, and in what particulars, they are unfitted for the industrial pursuits, the mining, agricultural, grazing, manufacturing, and municipal interests of these Pacific communities. (2) The existing law of these states and territories, as founded upon statutory legislation, Spanish-Mexican laws, customs, and judicial decisions, should be carefully examined and formulated, as far as possible, so that its imperfections, omissions, advantages, and defects would be clearly disclosed and understood. With the knowledge obtained from such an investigation only, can the legislature construct a system of statutory rules which shall represent, harmonize, and protect *all* conflicting interests, as far as it is possible to provide for and protect all by a compromise in which each must make some surrender, must submit to some curtailment. Common justice requires some partial surrender by each in order that all may be benefited; and the chief difficulty lies in making an *equitable* apportionment of such burdens among all classes of proprietors. Statutes which recognized the rights of riparian owners alone, by simply enacting the common-law rules, would destroy the main usefulness of our streams, and stop the development of the great agricultural resources, by rendering any extensive system of irrigation practically impossible. On the other hand, statutes which should wholly ignore the interests of riparian proprietors would invade vested rights, and produce evils equally grave and far-reaching.

## § 2. Object of the present work.

As well for the purpose of furnishing a slight contribution towards such amendatory legislation, as for the purpose of discussing a subject of great importance to the legal profession, I intend, in the following pages, to examine the existing law con-

cerning Water Rights and the Rights of Riparian Owners; as it prevails in the southern states and territories of the Pacific slope; to ascertain, as far as practicable, the rules which have been established by statute or by judicial decision; to point out the omissions, imperfections, contradictions, or questions left unsettled; and to compare these results generally with the common-law and the Spanish-Mexican systems. I may, in conclusion, suggest some amendments which might properly be made by the legislature.

### § 3. The problem stated.

In these Pacific states and territories, water is the one essential element of all productiveness and consequent prosperity. Its use for mining operations first attracted attention, and was the subject of some partial legislation. Its use for agricultural purposes of every kind has become far more important and beneficial, and more closely connected with the permanent welfare of these communities. Regions which are apparently most desert and sterile, can, with a sufficient supply of water, be turned into gardens, and made to "blossom as the rose." Nature has arranged abundant means and facilities for such an artificial supply. For example, in the great San Joaquin valley east of the San Joaquin river—which at times seems to be an expanse of dry sand—there is hardly an acre which cannot be reached by a well-constructed system of irrigation utilizing the water of the streams which rise in the high *sierras*, cross the valley at nearly equal intervals, and empty into the San Joaquin. With such irrigation, the whole valley would be, perhaps, the most fertile district in the world. I may remark in passing that never before did I so fully appreciate this wonderful transforming power of water, as after riding, some years ago, a whole day over the foot-hills, parched and browned and barren, I drove the few miles from the ferry at Merced Falls to the village of

Snelling, through what was in fact a rural paradise,—through green fields, roads overarched with rows of magnificent trees, and door-yards filled with flowers,—all the effect of irrigation obtained from the Merced. Similar illustrations may be seen in all parts of this state. But these uses of water for mining, for irrigation, for municipal purposes, necessarily diminish, to a very considerable extent, the natural and normal supply of the lakes and streams from which it is taken, and therefore conflict with the common-law rights of the riparian owners, and violate the settled doctrines of the common law. It is simply impossible to utilize water for any of these purposes, and then to return it, substantially unchanged, in amount and condition, to its original channels. The problem is to reconcile, or rather to adjust, these necessary uses, and the common-law rights and interests of all other and riparian proprietors. It will be expedient to state by way of preface, for purposes of comparison and illustration, the general doctrines of the common law; and this will be attempted in the following chapter.

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## CHAPTER II.

### THE COMMON-LAW DOCTRINE.

- § 4. Priority of appropriation gives no superior right.
- 5. Statement of leading cases.
- 6. Inland lakes and navigable streams.
- 7. Specific rules stated.
- 8. Riparian owner's right to natural flow of stream.
- 9. This right is parcel of the realty.
- 10. Diversion, when permissible.
- 11. Exceptions to common-law rule against appropriation.

#### § 4. Priority of appropriation gives no superior right.

The common-law doctrine, in its most general form, is that the water of permanent running streams and of inland lakes is sacred to the common use alike of all the riparian proprietors upon their borders. This doctrine extends both to navigable and unnavigable streams and lakes which are wholly inland and territorial. Each proprietor may use the water for all reasonable purposes as it passes through or by his land, provided that he does not interfere with the public easement of navigation in all navigable lakes and streams; but he must, after its use, return it without substantial diminution in quantity or change in quality to its natural bed or channel, before it leaves his own land, so that it will reach his adjacent proprietor in its full, original, and natural condition. No priority of use or appropriation by any one proprietor can give him any higher or more extensive rights than these, as against other proprietors either higher up or lower down on the stream, or abutting on either side of him upon the shores of the lake. More extensive or exclusive rights than these against other riparian proprietors can only be acquired by grant from them, or by prescription which

presupposes a former grant.<sup>1</sup> Even the state, by its power of eminent domain, cannot give any more extensive or exclusive rights to one proprietor, under color of a public use, without making provision for compensation to all other proprietors whose natural rights would thus be invaded. This general doctrine, and all the detail of subordinate rules to which it leads, are fully sustained by the almost unanimous *consensus* of modern decisions; although there may be some *partial* deviations from its consequences in certain particulars in a few of the states.

### § 5. Statement of leading cases.

In the well-considered case of *Heath v. Williams*, 25 Me. 209, Mr. Justice Shepley briefly but accurately stated the general doctrine: "The cases decide that priority of appropriation of the water of a stream confers no exclusive right to the use of it. A riparian proprietor, who owns both banks of a stream, has a right to have the water flow in its natural current, without any obstruction injurious to him, over the whole extent of his land, unless his rights have been impaired by grant, license, or an adverse appropriation for more than twenty years." In *Tyler v. Wilkinson*, 4 Mason, 397, Judge Story said: "Of a thing common by nature there may be an appropriation by

<sup>1</sup>[In the United States it is well settled that mere prior occupancy or appropriation of the water of a running stream by a riparian owner, unless continued for such a length of time as to raise a presumption of a grant, can give no exclusive right thereto as against other owners above or below him on the same stream, except where the common law has been modified by local usage or by statutory enactment. *Heath v. Williams*, 25 Me. 209; *Evans v. Merriweather*, 3

*Scam.* 492; *Gilman v. Tilton*, 5 N. H. 231; *Cowles v. Kidder*, 24 N. H. 378; *Parker v. Hotchkiss*, 25 Conn. 321; *Keeney Manuf'g Co. v. Union Manuf'g Co.*, 39 Conn. 576; *Hartzall v. Sill*, 12 Pa. St. 248; *Pugh v. Wheeler*, 2 Dev. & B. 55; *Bliss v. Kennedy*, 43 Ill. 67; *Dumont v. Kellogg*, 29 Mich. 420; *Stillman v. White Rock Co.*, 3 Woodb. & M. 550; *Tyler v. Wilkinson*, 4 Mason, 397; *Ang. Water-Courses*, §§ 134, 350.]



general consent or grant. Mere priority of appropriation of running water, without such consent or grant, confers no exclusive right. It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupancy. That supposes no ownership already existing, and no right to the use already acquired. But our law annexes to the riparian proprietorship the right to the use in common, as an incident to the land; and whosoever seeks to found an exclusive use, must establish a rightful appropriation in some manner known and admitted by the law. Now, this may be either by a grant from all the proprietors whose interest is affected by the particular appropriation, or by a long, exclusive enjoyment without interruption, which affords a just presumption of right." In *Pugh v. Wheeler*, 2 Dev. & B. 55, Ruffin, C. J., stated the general doctrine in the following somewhat fuller manner: "If one build a mill on a stream, and a person above divert the water, the owner of the mill may recover for the injury to the mill, although before he built he could only recover for the natural uses of the water, as needed for his family, his cattle, and irrigation; but, if instead of building a mill he had diverted the stream itself, he cannot justify it against a proprietor below, upon the ground that he had thus made an artificial use of the water before the other had made any such application of it. The truth is that every owner of land on a stream necessarily and at all times is using water running through it, if in no other manner, in the fertility it imparts to his land, and the increase in the value of it. There is therefore no prior or posterior in the use, for the land of each enjoyed it alike from the origin of the stream, and the priority of a particular new application or artificial use of the water does not, therefore, create the right to that use; but the existence or non-existence of that application at a particular time measures the damages of a wrongful act of another in derogation of the general right to the use of

the water as it passes to, through, or from the land of the party complaining. The right is not founded in user, but is inherent in the ownership of the soil, and, when a title by use is set up against another proprietor, there must be an enjoyment for such length of time as will be evidence of a grant, and thus constitute a title under the proprietor of the land. \* \* \* The use to which one is entitled is not that which he happens to get before another, but it is that which, by reason of his ownership of land on the stream, he can enjoy *on* his land, and as an appurtenant to it."<sup>1</sup>

## § 6. Inland lakes and navigable streams.

The same doctrine concerning the particular uses and appropriation of water by riparian owners is extended to inland lakes and streams which are navigable.<sup>2</sup> This subject was recently considered by the New York court of appeals in the case of *Smith v. City of Rochester*, 92 N. Y. 463. In a very elaborate and learned opinion, that court decided (in June, 1883) that "riparian owners of land, adjoining fresh-water non-navigable streams, as an incident of their ownership acquire the right to the usufructuary enjoyment of the undiminished and undisturbed flow of said stream. This is also true of the fresh-water navigable streams and small lakes within the state where the tide does not ebb and flow; save that the public has an easement in such waters for the purpose of travel, as on a public highway, which easement, as it pertains to the sovereignty of

<sup>1</sup> See also the elaborate editorial note to *Heath v. Williams*, 43 Amer. Dec. 269-279, in which numerous cases, English and American, are collected, and the special rules established by them are formulated.

<sup>2</sup> [The subject of riparian rights on navigable streams will be fully

discussed in a subsequent chapter. It has been held that while a general grant of land on a non-navigable river or stream extends the line of the grantee to the middle or thread of the current, a grant on a natural lake or pond extends only to the water's edge. *State v. Milk*, 11 Fed. Rep. 389.]

the state, is inalienable, and gives to the state the right to use, regulate, and control the waters for the purposes of navigation. This public easement gives the state no right to convert the waters, or to authorize their conversion, to any other uses than those for which the easement exists; that is, for the purposes of navigation. The right to divert the water for other uses, although public in their nature, can only be acquired under and by virtue of the sovereign right of eminent domain, and upon making just compensation. This doctrine concerning the rights of riparian owners does not, however, apply to the vast freshwater lakes or inland seas between the United States and Canada, nor to streams forming the boundary lines of states. The rights of riparian owners on the Hudson and Mohawk rivers, in New York, are derived from the rules of the civil law as it prevailed in the Netherlands during the colonial period." The facts of this case well illustrate the workings of the common-law rules. Hemlock lake is a small lake in the interior of New York, about seven miles long and one and a half wide. It is to a certain extent navigable, and has been navigated with small craft by the residents on its borders. The decision, it will be seen, treats it as navigable. Its surplus waters form a stream which is unnavigable. On this stream, near the outlet of the lake, the plaintiff has a mill, and the water of the stream was sufficient to keep the mill in operation throughout the entire year. In 1873, under authority conferred by the legislature of the state, the city of Rochester constructed a conduit or aqueduct from this lake to the city, for the purpose of furnishing a supply of water to its inhabitants. By this aqueduct over 4,000,000 gallons daily were drawn from the lake, and the flow of surplus water through the natural outlet was so diminished that the operations of the plaintiff's mill were seriously interfered with, and in some parts of the year entirely stopped. No com-

pensation was paid or offered by the city to the plaintiff. On these facts the court held, in pursuance of the doctrines above quoted, that the plaintiff was entitled to relief against the city.

### § 7. Specific rules stated.

From this general doctrine, the following more specific rules necessarily follow. A riparian proprietor need not have actually appropriated the water of a stream, in order that he may be entitled to complain of a diversion by another proprietor; actual damages are not necessary, for damage is conclusively presumed from any such diversion.<sup>1</sup> A riparian proprietor cannot consume the entire stream for any purpose. He may appropriate the water for his own necessary uses, but this right must be reasonably exercised, and there must be no substantial diminution or waste.<sup>2</sup> The editorial note cited below, sums up the common-law doctrine, as the result of the American and English cases, as follows: "The general principle is that every owner of land through which a natural stream of water flows (or abutting on a natural inland lake) has a usufruct in the stream as it passes along, and has an equal right with those above and below him to the natural flow of the water in its accustomed channel, without unreasonable detention or substantial diminution in quantity or quality, and none can make any use of it prejudicial to the other owners, unless he has acquired a right to do so by license, grant, or prescription."

<sup>1</sup>Adams v. Barney, 25 Vt. 225. Nor is it any defense to an action for diverting water from a riparian proprietor to show that no injury would have accrued to him if he had not changed the manner or extent of his use, because, independent of any particular use of or for it, he has the right to the flow of the water on his own land without

diminution or alteration. *Buddington v. Bradley*, 10 Conn. 213.

<sup>2</sup>See *Adams v. Barney*, 25 Vt. 225; *Townsend v. McDonald*, 12 N. Y. 381; *Pillsbury v. Moore*, 44 Me. 154; *Bliss v. Kennedy*, 43 Ill. 67; and other cases cited in the editorial note in 43 *Amer. Dec.* 274, 275.

## § 8. Riparian owner's right to natural flow of stream.

[It is a familiar and uniform rule of the common law—recognized and enforced by the courts both in this country and in England—that every riparian proprietor, as an incident to his estate, is entitled to the natural flow of the water of running streams through his land, in their accustomed channels, undiminished in quantity and unimpaired in quality; that no one can lawfully divert the water from his premises; and that none of the riparian owners can use the water to the material injury of those above or below him, although all have a right to the reasonable use of it for the ordinary purposes of life.<sup>1</sup> In this connection, the following language of Chancellor Kent is frequently cited, as embodying a terse and accurate statement of the rule: “Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in

<sup>1</sup>*Embrey v. Owen*, 6 Exch. 352; *Wood v. Waud*, 3 Exch. 748; *Bealey v. Shaw*, 6 East, 208; *Mason v. Hill*, 3 Barn. & Adol. 304; *Wright v. Howard*, 1 Sim. & S. 190; *Orr Ewing v. Colquhoun*, L. R. 2 App. Cas. 839; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Tyler v. Wilkinson*, 4 Mason, 397; *Pillsbury v. Moore*, 44 Me. 154; *Cowles v. Kidder*, 24 N. H. 364; *Tillotson v. Smith*, 32 N. H. 90; *Martin v. Bigelow*, 2 Aiken, 184; *Merrifield v. Lombard*, 13 Allen, 16; *Pratt v. Lamson*, 2 Allen, 275; *Springfield v. Harris*, 4 Allen, 494; *King v. Tiffany*, 9 Conn. 162; *Buddington v. Bradley*, 10 Conn. 213; *Wadsworth v. Tillotson*, 15 Conn. 366; *Clinton v. Myers*, 46 N. Y. 511; *Arnold v. Foot*, 12 Wend. 330; *Hoy v. Sterrett*, 2 Watts, 327; *Holsman v. Boiling Springs Co.*, 14 N. J. Eq. 335; *Ten Eyck v. Delaware Canal*

*Co.*, 18 N. J. Law, 200; *Mayor of Baltimore v. Appold*, 42 Md. 442; *Omelvany v. Jaggars*, 2 Hill, (S. C.) 634; *Hendrick v. Cook*, 4 Ga. 241; *Hendricks v. Johnson*, 6 Port. (Ala.) 472; *Potier v. Burden*, 38 Ala. 651; *Rhodes v. Whitehead*, 27 Tex. 304; *Shamleffer v. Council Grove Mill Co.*, 18 Kan. 24; *Cooper v. Williams*, 4 Ohio, 253; *Case v. Weber*, 2 Ind. 108; *Dilling v. Murray*, 6 Ind. 324; *Mitchell v. Parks*, 26 Ind. 354; *Evans v. Merriweather*, 3 Scam. 492; *Plumleigh v. Dawson*, 1 Gilman, 544; *Rudd v. Williams*, 43 Ill. 385; *Druley v. Adam*, 102 Ill. 177; *Davis v. Getchell*, 50 Me. 604; *Vliet v. Sherwood*, 35 Wis. 229; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 753; *Taylor v. Welch*, 6 Or. 198; *Coffman v. Robbins*, 8 Or. 278; 3 Kent, Comm. \*439; *Ang. Water-Courses*, § 95; *Gould, Waters*, § 204.

the stream adjacent to his lands as it was wont to run, (*currere solebat*,) without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors, above or below him, unless he has a prior right to divert, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere*, is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate.”<sup>1</sup>

### § 9. This right is parcel of the realty.

Although, as above stated, the riparian owner has no property in the water itself, but only a usufructuary enjoyment of it as it passes through or along his lands, yet it is not to be inferred that his right to have the stream flow in its natural channel, without diminution or alteration, is merely appurtenant to the estate, or conditioned upon his actual application of it to some beneficial use. “By the common law,” say the court in California, “the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it. Use does not create the right, and disuse cannot destroy or suspend it. The right in each extends to the natural and usual flow of all the water, unless where the quantity has been diminished as a consequence of the reasonable application of it by other riparian owners for purposes hereafter to be mentioned.”<sup>2</sup>

A right to the flow of water, then, is a corporeal right or hereditament which passes by grant of the land over which it runs.

<sup>1</sup> 3 Kent, Comm. \*439.

<sup>2</sup> *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 753; citing *Ang. Water-*

*Courses*, § 93; *Shury v. Piggot*, Bulst. 339; *Countess of Rutland v. Bowler*, Palmer, 290; *Washb.*

It may be conveyed absolutely, or lost or acquired, either wholly or in part, by an adverse user, sufficiently long, exclusive, and notorious to furnish adequate grounds for presumption of a grant.<sup>1</sup>

### § 10. Diversion, when permissible.

It is also a right of the riparian owner, at common law, to have the stream flow in its natural channel without diversion. But this right extends no further than the boundaries of his own estate. He cannot complain of the mere fact of a diversion of the water-course, either above or below him, if, within the limits of his own property, it is allowed to follow its accustomed channel. Hence it is not unlawful to change the course of a stream within the limits of one's own land, if the stream is returned to its natural channel before leaving the land, and its flow is not materially diminished.<sup>2</sup>

### § 11. Exceptions to common-law rule against appropriation.

There are some cases, even at common law, where a prior appropriation will give the occupant superior privileges over the other proprietors on the same stream. Thus, in a Massachusetts decision, it is held that the riparian proprietor, who first erects his dam for reasonable mill purposes, has a right to maintain it as against proprietors above and below, although by so doing the others are prevented from placing dams and mills on their land. In such case, prior occupancy gives a prior right

Easem. 319; Gould, Waters, § 204; Johnson v. Jordan, 2 Metc. 239; Cary v. Daniels, 5 Metc. 238; Tyler v. Wilkinson, 4 Mason, 397; Sampson v. Hoddinott, 1 C. B.(N. S.) 590; Hill v. Newman, 5 Cal. 445; Pope v. Kinman, 54 Cal. 3; Creighton v. Evans, 53 Cal. 55; Ferrea v. Knipe.

28 Cal. 340; Hale v. McLea, 53 Cal. 578; Hanson v. McCue, 42 Cal. 303. See, also, Wadsworth v. Tillotson, 15 Conn. 366.

<sup>1</sup>Lux v. Haggin, (Cal.) 4 Pac. Rep. 919.

<sup>2</sup>Pettibone v. Smith, 37 Mich. 579; Norton v. Volentine, 14 Vt. 239.

to such use. In the case referred to, Shaw, C. J., said: "The usefulness of water for mill purposes depends as well on its fall as its volume. But the fall depends upon the grade of the land over which it runs. The descent may be rapid, in which case there may be fall enough for mill-sites at short distances; or the descent may be so gradual as only to admit of mills at considerable distances. In the latter case, the erection of a mill on one proprietor's land may raise and set the water back to such a distance as to prevent the proprietor above from having sufficient fall to erect a mill on his land. It seems to follow, as a necessary consequence from these principles, that in such case the proprietor who first erects his dam for such a purpose has a right to maintain it as against the proprietors above and below; and to this extent prior occupancy gives a prior title to such use. It is a profitable, beneficial, and reasonable use, and therefore one which he has a right to make. If it necessarily occupy so much of the fall as to prevent the proprietor above from placing a dam and mill on his land, it is *damnum absque injuria*. For the same reason the proprietor below cannot erect a dam in such a manner as to raise the water and obstruct the wheels of the first occupant. He had an equal right with the proprietor below to an equal use of the stream; he had made only a reasonable use of it; his appropriation to that extent, being justifiable and prior in time, necessarily prevents the proprietor below from raising the water, without interfering with a rightful use already made; and it is therefore not an injury to him. Such appears to be the nature and extent of the prior and exclusive right which one proprietor acquires by a prior reasonable appropriation of the use of the water in its fall; and it results, not from any originally superior legal right, but from a legitimate exercise of his own common right, the effect of which is, *de facto*, to supersede and prevent a like use by other proprietors originally having the same common right. It is, in



this respect, like the right in common, which any individual has, to use a highway. While one is reasonably exercising his own right, by a temporary occupation of a particular part of a street with his carriage or team, another cannot occupy the same place at the same time."<sup>1</sup> It is to be remarked, however, that the appropriation here sanctioned was not of the stream itself,—at least, not to its whole extent,—but only of its power to drive machinery. The other riparian owners would continue in the enjoyment of the water for all the purposes to which it could ordinarily be put, except this one. Hence this apparent departure from the doctrine of the common law could not be invoked in aid of one who should entirely divert the water-course, or appropriate its whole volume to his private uses. And it is proper to add that this rule has been repudiated in certain other states, or else conditioned upon a continuance of the appropriation for such a period of time as would be requisite to establish rights by prescription.<sup>2</sup>]

<sup>1</sup> *Cary v. Daniels*, 8 Metc. 466, s. c. 41 Amer. Dec. 532. And see *Gould v. Boston Duck Co.*, 13 Gray, 451; *Fuller v. Chicopee Manuf'g Co.*, 16 Gray, 44; *Smith v. Agawam Canal Co.*, 2 Allen, 357; *Pratt v. Lamson*, Id. 288; *Lowell v. Boston*,

111 Mass. 465; *Lincoln v. Chadbourne*, 56 Me. 197; *Miller v. Troost*, 14 Minn. 365, (Gil. 282.)

<sup>2</sup> See *Parker v. Hotchkiss*, 25 Conn. 321; *Keeney Manuf'g Co. v. Union Manuf'g Co.*, 39 Conn. 576; *Dumont v. Kellogg*, 29 Mich. 420.

## CHAPTER III.

### APPROPRIATION OF WATERS FLOWING THROUGH THE PUBLIC DOMAIN.

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- 15. Doctrine of appropriation.
- 16. Appropriation not at first availing as against the government.
- 17. The act of congress of 1866.
- 18. Limits of the doctrine of appropriation — The early cases.
- 19. Views of the United States supreme court.
- 20. Grounds of these decisions.
- 21. Doctrine of appropriation unknown to the common law.
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- § 30. Appropriation confined to public lands.
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#### IV. CONFLICTING CLAIMS BETWEEN SETTLERS AND APPROPRIATORS.

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- § 42. Later decisions establishing doctrine of relation.
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- 44. Summary of conclusions.

## I. ORIGIN AND BASIS OF THE RIGHT TO APPROPRIATE.

### § 12. Scope of the present chapter.

Having stated the fundamental doctrines of the common law concerning the use of running streams and small inland lakes, and the rights of riparian owners, as established by the general *consensus* of English and American decisions, I shall proceed to examine, with more of detail, the variations from these doctrines which have been made by the courts or recognized by the legislation of the Pacific commonwealths. In this division of the subject it will be expedient to notice, in the first place, certain matters, connected with various conditions of fact, which may be regarded as settled, and subsequently to discuss those questions which are still open, and which admit of conflicting opinions, or involve, perhaps, a conflict of decision.

### § 13. Early importance of mining interests.

From the time of the discovery of gold in California the mining interests became, and for many years continued to be in that state, and still are in other Pacific states and territories, of paramount importance, to which agriculture, manufacturing, and all other industries were subordinated. The lands containing the minerals belonged almost entirely to the public domain of the United States. Vast numbers of immigrants poured over these mineral regions, settled down in every direction, appropriated parcels of the territory to their own use, and were prospecting and mining in every mode rendered possible by their own resources, under no municipal law, and with no restraint except that of superior physical force. "The world has probably never seen a similar spectacle,—that of extensive gold fields

suddenly peopled by masses of men from all states and countries, restrained by no law, and not agreed as to whence the laws ought to emanate by which they would consent to be bound.”<sup>1</sup>

#### § 14. Mining customs.

In this condition of affairs, the miners themselves adopted certain “mining customs” to which they yielded a voluntary obedience, and which were afterwards recognized and sanctioned by the legislation of the state and of congress. Scattered over the territory at “camps,” “bars,” and “diggings,” the miners held meetings in each district or locality, and enacted regulations by which they agreed to be governed. The rules once adopted were enforced with rigor upon all settlers in the particular camp. The legislature of California, at the session of 1851, gave to these voluntary regulations a legal and compulsive efficacy by the following brief but admirably comprehensive statute: “In actions concerning mining claims, proof shall be admitted of the customs, usages, or regulations established or in force at the bar or diggings embracing said claims, and such customs, usages, or regulations, when not in conflict with the constitution and laws of this state, shall govern the decision of the action.” These “mining customs” or rules were simple, and related to the acquisition of “claims” to mineral lands and to water for the purposes of mining, and prescribed the acts necessary to constitute such an appropriation of a parcel of mineral land or portion of a stream as should give the claimant a prior right against all others, the amount of work which would entitle him to a continued possession and enjoyment, what would constitute an abandonment, and similar matters.<sup>2</sup> In this proceeding we find the origin of the peculiar doctrines concerning water rights as set-

<sup>1</sup>As to the early history of gold mining on the Pacific coast, the customs adopted by the miners, the origin of the right to appropri-

ate water, etc., see remarks of Field, J., in *Jennison v. Kirk*, 98 U. S. 453.

<sup>2</sup>See *infra*, § 24.

tled in the Pacific communities. Water was an indispensable requisite for carrying on mining operations; a permanent right to use certain amounts of water was as essential as the permanent right to occupy a certain parcel of mineral land. The streams and lakes were all on the public domain. For their advantageous employment it was often necessary to divert water from its natural bed, and to carry it through artificial channels,—"ditches" or "flumes,"—sometimes of great length and constructed at an enormous cost. There were no riparian owners or occupants except the miners, and the streams could be put to no beneficial use except for purposes of mining. From all these circumstances, and from the very necessities of the situation, it universally became one of the mining customs or regulations that the right to use a definite quantity of water, and to divert it if necessary from these streams and lakes, could be acquired by prior appropriation.

### § 15. Doctrine of appropriation.

The custom thus originating was soon approved by the courts, and the doctrine became and still is settled in California and other Pacific states and territories, in opposition to the common law, that a permanent right of property in the water of streams or inland lakes, which wholly ran through or were situate upon the public lands of the United States, may be acquired for mining purposes by mere prior appropriation; that a prior appropriator may thus acquire the right to divert, use, and consume a quantity of water from the natural flow or condition of such streams or lakes, which may be necessary for the purposes of his mining operations; and that he becomes, so far as he has thus made an actual prior appropriation, the owner of the water as against all the world, except the United States government. This doctrine, applied at first to the operations of mining, has been extended to all other beneficial purposes for which water may be

essential,—to milling, manufacturing, agricultural, irrigating, and municipal purposes.<sup>1</sup>

### § 16. Appropriation not at first availing as against the government.

[It is very important to be noted that the right of property in running waters by appropriation, thus recognized by the courts and sanctioned by legislation, had as yet acquired no validity whatever as against the federal government or its grantee. In this respect, however clear might be the superior rights of a prior appropriator as against another person not the owner of the soil, they acquired no sanction as against the United States, or its patentee, until the act of congress of 1866. Hence it has never been held by the supreme court of the United States, or by the state courts, that an appropriation of water on the public domain, made after the act of congress of 1866, (or that of 1870,) gave to the appropriator the right to the water appropriated as against a grantee of riparian lands under a grant made or issued *prior* to the act of 1866, except in a case where the water so subsequently appropriated was reserved by the

<sup>1</sup> *California*. Parks Canal, etc., Co. v. Hoyt, 57 Cal. 44; Hill v. Smith, 27 Cal. 480; Wixon v. Bear River, etc., Co., 24 Cal. 367; Phoenix W. Co. v. Fletcher, 23 Cal. 481; Kidd v. Laird, 15 Cal. 162; Ortman v. Dixon, 13 Cal. 33; McDonald v. Bear River, etc., Co., Id. 220; Bear River, etc., Co. v. New York Min. Co., 8 Cal. 327; Crandall v. Woods, Id. 136; Hill v. King, Id. 336; Hoffman v. Stone, 7 Cal. 46; Kelly v. Natoma W. Co., 6 Cal. 107; Hill v. Newman, 5 Cal. 445; Irwin v. Phillips, Id. 140; and see, also, Maeris v. Bicknell, 7 Cal. 261, 262; Nevada, etc., Co. v. Kidd, 37 Cal. 282, 312; Farley v. Spring Valley M.

Co., 58 Cal. 142; Himes v. Johnson, 61 Cal. 259. *Nevada*. Strait v. Brown, 16 Nev. 317; Barnes v. Sabron, 10 Nev. 217; Ophir Silver M. Co. v. Carpenter, 4 Nev. 534; Lobdell v. Simpson, 2 Nev. 274. *Colorado*. Schilling v. Rominger, 4 Colo. 100. *Utah*. Crane v. Winsor, 2 Utah, 248. *Montana*. Atchison v. Peterson, 1 Mont. 561. *For purposes of irrigation, etc.* Barnes v. Sabron, 10 Nev. 217; Lobdell v. Simpson, 2 Nev. 274. *Of manufacturing or milling.* McDonald v. Bear River, etc., Co., 13 Cal. 220; Ortman v. Dixon, Id. 33; and see note in 43 Amer. Dec. 279, 280.

terms of such grant.<sup>1</sup> This principle is asserted—and is clearly deduced from the authorities—in a recent decision of the supreme court of California;<sup>2</sup> from which we quote as follows: “In the case of *Vansickle v. Haines*, 7 Nev. 249, the plaintiff had diverted one-fourth of the water of Daggett creek in the year 1857. He made the diversion at a point then on the public land, but which, in 1864, was patented by the United States to the defendant Haines. In 1865, Vansickle obtained a patent for his own land, where he used the water. In 1867, Haines constructed a wood flume on his land, and turned into it all the water of the stream, thereby depriving the plaintiff of that part of it which he had been using. The supreme court of Nevada held that the plaintiff, by his appropriation of water *prior* to the date of defendant's patent, acquired no right which could affect that grant; and that while the act of congress of July, 1866, protected those who at that time were diverting water from its natural channels on the public lands; and while all patents issued or titles acquired from the United States since that date are obtained subject to the rights of water by appropriation existing at that time, yet, with respect to patents for riparian lands issued *before* the act of congress, the patentee had already acquired the right to the flow of the water, with which congress could not interfere.” The court continued: “*Broder v. Water Co.*, 101 U. S. 274, may appear to be in conflict with *Vansickle v. Haines*. But is there any real conflict? It will be observed that the *Broder Case* turned (so far as the plaintiff's title from the railroad company was concerned) on the reservation clause in the act constituting the grant to the company, and the court held that ‘a lawful claim,’ within the meaning of the reservation in the act of 1864, was ‘any honest claim evidenced by improvements and other acts of possession.’ The

<sup>1</sup>*Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 724. See, also, *Ison v.*

*Nelson Min. Co.*, 47 Fed. Rep. 199.

<sup>2</sup>*Lux v. Haggin*, *supra*.

construction given to the language of the reservation, of course, implies that those who appropriated lands or waters on the public lands, prior to the acts of 1864 or 1866, had not been treated by the government in those acts as mere trespassers, but as there by license. It does not imply that they had acquired any title which could be asserted against the United States or its grantees, except so far as their occupations of land or water were protected and reserved to them by acts of congress.”]

### § 17. The act of congress of 1866.

The right of property thus settled by state courts availed against all persons except the United States government. This limitation was soon removed. The United States government recognized the right to water on the public domain, thus acquired by prior appropriation, as a substantial and valid right which the government was bound to acknowledge and protect; and it repeatedly approved and adopted the doctrine which had sprung from the mining customs and been settled by the state and territorial decisions.<sup>1</sup> This view was expressly confirmed by a statute of congress passed July 26, 1866:<sup>2</sup> “Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and respected in the same; and the right of way for the construction of ditches and canals, for the purposes herein specified, is acknowledged and confirmed.” This statute, it is held by the United States supreme court, does not create the right; but it is “rather a voluntary recognition of a pre-existing right of possession, con-

<sup>1</sup>Broder v. Natoma Water Co., 20 Wall. 670; Atchison v. Peterson, 101 U. S. 274; Basey v. Gallagher, Id. 507.

<sup>2</sup>Rev. St. U. S. § 2339.



stituting a valid claim to its continued use, than the establishment of a new one."<sup>1</sup>

### § 18. Limits of the doctrine of appropriation—The early cases.

It will aid in the subsequent examination of the open questions to fix the exact extent and limits of the doctrine thus formulated, and to ascertain the grounds upon which it was rested by the courts. A very few of the earliest cases enter into no discussion, and seem to speak as though the rule were universal, applicable to all waters under all circumstances.<sup>2</sup> But most of these early decisions state the reasons for the doctrine in the most express manner, and thus indicate its grounds, extent, and limits. One or two illustrations will suffice. In *Hoffman v. Stone*,<sup>3</sup> Murray, C. J., said: "The former decisions of this court, in cases involving the right of parties to appropriate waters for mining and other purposes, have been based upon the *wants of the community, and the peculiar condition of things in this state*, (for which there is no precedent,) rather than any absolute rule of law governing such cases. The absence of legislation on this subject has devolved on the courts the necessity of framing rules for the protection of this great interest, and in determining these questions we have conformed, as nearly as possible, to the analogies of the common law. The fact early manifested itself, that the mines could not be successfully worked without a proprietorship in waters, and it was recognized and maintained. To protect those who, by their energy, industry, and capital, had constructed canals and races carrying water for miles into

<sup>1</sup>*Broder v. Natoma Water Co.*, 101 U. S. 274. The act of congress of 1866 merely confirms to land-owners the rights and privileges they had formerly enjoyed by local customs and the decisions of

the courts. *Jones v. Adams*, 19 Nev. 78, 6 Pac. Rep. 442.

<sup>2</sup>See, for example, *Hill v. Newman*, 5 Cal. 445; *Kelly v. Natoma W. Co.*, 6 Cal. 107.

<sup>3</sup>7 Cal. 47, 48, (1875.)

parts of the country which must have otherwise remained unfruitful and undeveloped, it was held that the first appropriator acquired a special property in the waters thus appropriated; and, as a necessary consequence of such property, might invoke all legal remedies for its enjoyment or defense. A party appropriating water has the sole and exclusive right to use the same for the purposes for which it was appropriated, and, so long as he is not obstructed in the use thereof, he has no ground of action."

It should be observed that the waters referred to in this opinion were all upon public lands. In the case of *Bear River Min. Co. v. New York Min. Co.*<sup>1</sup> the reasons for the doctrine were stated by Mr. Justice Burnett more fully: "It may be said with truth that the judiciary of this state has had thrown upon it responsibilities not incurred by the courts of any other state in the Union. We have had a large class of cases unknown in the jurisprudence of our sister states. The mining interest of the state has grown up under the force of new and extraordinary circumstances, and in the absence of any specific and certain legislation to guide us. Left without any direct precedent, as well as without specific legislation, we have been compelled to apply to this anomalous state of things the analogies of the common law and the more expanded principles of equitable justice. There being no known system existing at the beginning, parties were left without any certain guide, and for that reason have placed themselves in such conflicting positions that it is impossible to render any decision which will not produce great injury, not only to the parties immediately connected with the suit, but to large bodies of men, who, though not formal parties to the record, must be deeply affected by the decision. No class of cases can arise more difficult of a just solution, or more dis-

<sup>1</sup>8 Cal. 327, 332, (1875.)

trekking in practical result. The business of gold mining was not only new to our people, and the cases arising from it new to our courts, and without judicial or legislative precedent, either in our own country or in that from which we have borrowed our jurisprudence, but there are intrinsic difficulties in the subject itself which it is almost impossible to settle satisfactorily, even by the application to them of the abstract principles of justice. Yet we are compelled to decide these cases, because they must be settled in some way, whether we can say, after it is done, that we have given a just decision or not. The uses of water for domestic purposes, and for the watering of stock, are preferred uses, because essential to sustain life. Other uses must be subordinate to these. In such cases the element is entirely consumed. Next to these may properly be placed the use of water for irrigation in dry and arid countries. In such cases the element is almost entirely consumed. Under a proper system of irrigation, only so much water is taken from the stream as may be needed, and the whole is absorbed or evaporated. Entire absorption is the contemplated result of irrigation. Where properly used as a motive power for propelling machinery, the element is not injured, because the slight evaporation occasioned by the use is unavoidable, and is not esteemed by the law a substantial injury. Considering the different uses to which water is applied in countries governed by the common law, it is not so difficult to understand the principles which regulate the relative rights of the different riparian proprietors. As to the preferred uses, each proprietor had the right to consume what was necessary, and after doing this he was bound to let the remaining portion flow, without material interruption or deterioration, in the natural channel of the stream to others below him. If the volume of water was not sufficient for all, then those highest up the stream were supplied in preference to those below. [The correctness of the proposition contained in this

sentence, as a common-law rule, may be questioned.] So far as the preferred uses were concerned, no one was allowed to deteriorate the quality of the water; and, for the purposes of a motive power, there was no use of the element which could impair its quality. But in our mineral region we have a novel use of water, that cannot be classed with the preferred uses, but still a use which deteriorates the quality of the element itself, when wanted a second time for the same purposes. In cases heretofore known, either the element was entirely consumed, or else its use did not impair its quality when wanted again for the same purpose. This fact constitutes the great difficulty in this and other like cases. If the use of water for mining purposes did not deteriorate the quality of the element itself, then the only injury that could be complained of would be the diminution in the quantity and the interruption in the flow. In repeated decisions of this court, it has been uniformly held that the miners were in the possession of the mineral lands under a license from both the state and the federal governments. This being conceded, the superior proprietor must have had some leading object in view when granting this license; and that object must have been the working of these mineral lands to the best advantage. The intention was to distribute the bounty of the government among the greatest number of persons, so as most rapidly to develop the hidden resources of this region; while at the same time the prior substantial rights of individuals should be preserved. In the working of these mines water is an essential element; therefore that system which will make the most of its use, without violating the rights of individuals, will be most in harmony with the end contemplated by the superior proprietor."

The conclusion was reached in this and other cases that the right of the first appropriator of water from a stream on the public domain is equally protected, so far as the *quantity* is con-

cerned, from damage occasioned by subsequent locators above him, as well as below him. But as to the deterioration in the *quality* alone of the water, by reason of its being used by others for mining purposes before it reaches the ditch of the prior appropriator, this must be deemed *damnum absque injuria*. Any other rule, it was said, would involve an absolute prohibition of the use of *all* the water of a stream above any prior appropriator, in order to preserve the quality of a small portion taken by him from the stream.

### § 19. Views of the United States supreme court.

It may be instructive to compare these early views of the California court with the recent judgments pronounced by the supreme court of the United States. In *Atchison v. Peterson*,<sup>1</sup> which came up from Montana, Mr. Justice Field said: "By the custom which has obtained among miners in the Pacific states and territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or to use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property. As respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day, after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessities of the miners, and inadequate to their protection. By the common law the riparian owner on a stream not navigable takes the land to the center

<sup>1</sup>20 Wall. 507, (1874.)

of the stream, and such owner has the right to the use of the water flowing over the land as an incident to his estate." The judge gives a summary of the common-law doctrines as they are stated in the preceding chapter, and then proceeds as follows: "This equality of right [at the common law] among all the proprietors on the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its convenience for mining purposes to points from which it could not be restored to the stream. But the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrines of riparian proprietorship with respect to the waters of these streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated, and open to general exploration, does in natural justice acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public land throughout the Pacific states and territories, by their customs, usages, and regulations, everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation and enforced by the courts in those states and territories." He quotes from some of the early California decisions hereinbefore cited, and further says: "This doctrine of right by prior appropriation was recognized by the legislation of congress in 1866, [quoting the statute of congress.] The right to water by prior appropriation, thus recognized and established as the law of miners on the mineral lands of the public domain, is limited in every case, in quantity and quality, by the uses for which the appropriation is made." Hav-

ing thus explained the origin of the doctrine, the opinion goes on to state more particularly the extent and limits of the right thus acquired, the relations of the appropriator with other occupants, and the like. This portion of the opinion will be quoted in connection with subsequent discussions. In the case of *Basey v. Gallagher*,<sup>1</sup> the same doctrine was applied by the United States supreme court to all other beneficial purposes for which water is essential, as well as to mining. Mr. Justice Field, after quoting the decision in *Atchison v. Peterson*, said: "The views there expressed and the rulings made are equally applicable to the use of water on the public lands for purposes of irrigation. No distinction is made in the states and territories of the Pacific coast by the customs of miners or settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one." He quotes an early California decision to this effect,<sup>2</sup> and proceeds: "Ever since that decision it has been held generally throughout the Pacific states and territories that the right to water by prior appropriation for any beneficial purpose is entitled to protection. Water is diverted to propel machinery in flour-mills and saw-mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual. The act of congress of 1866 recognizes the right to water by prior appropriation for

<sup>1</sup>20 Wall. 671, (1874.)    <sup>2</sup>*Tartar v. Spring V. M. Co.*, 5 Cal. 397, (1855.)

agricultural and manufacturing purposes, as well as for mining.

\* \* \* It is evident that congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of water, which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by the legislation of the state or territory, or by the decisions of the court. The union of the three conditions, in any particular case, is not essential to the perfection of the right by priority; and, in case of conflict between a local custom and a statutory regulation, the latter, as of superior authority, must necessarily control."

These extracts have been given for a definite purpose, and they have a most important bearing upon the future discussion of other questions.

## § 20. Grounds of these decisions.

It is essential, to any accuracy in such discussions, that we should ascertain at the outset the exact grounds of the peculiar doctrine which lies at the foundation of the entire law concerning water rights in the Pacific communities. The question will afterwards rise whether this doctrine determines all the special rules which may apply to all circumstances and to all conditions of ownership; or whether, on the other hand, this doctrine only partially displaces the common law, leaving it applicable under different circumstances and conditions. It is plain, upon the most superficial examination, that the opinions which have been quoted—and the same is true of other cases—do not profess to derive their conclusions from the common law. On the contrary, they openly avow that these conclusions are directly opposed to the common law. They base their reasoning and its results upon the peculiar social and industrial needs of the early settlers, especially the miners; upon the condition of the



public domain in which the mining was carried on; upon the evident intention of the federal government in throwing open the mineral wealth of the public lands to all comers, so that its advantages might be enjoyed equally by all persons; and upon the fact that the common-law rules would defeat this intention, and retard, if not wholly destroy, the development of the mineral resources. Although this departure from the common law was, at the very first, made with reference solely to the use of water for mining, it was soon necessarily extended to all other beneficial uses. There are undoubtedly some *dicta* to be found in a few of the California cases which seem to assume or to suppose that the conclusions reached by the court were in agreement with the common-law doctrines. These *dicta* differ widely from the general course of reasoning pursued by the state judges, and especially from that adopted by the United States supreme court; and they are, as it seems to me, utterly irreconcilable with many subsequent decisions, establishing more special rules, made by the state and the federal courts.

### § 21. Doctrine of appropriation unknown to the common law.

It has been urged, although the position has never, I believe, been sustained by any authoritative decision in the Pacific states or territories, that the common law, in its early and original form, recognized and permitted a prior appropriation of the waters of running streams; that the contrary rules, as laid down by Story and Kent, and as they are briefly formulated in our second chapter, are a modern departure from the primitive common law, first made by some comparatively recent English decisions; and that, as a necessary consequence, these original common-law doctrines, denying what are ordinarily called "riparian rights," and not the modern innovations acknowledging such rights, are binding upon and should be followed by the

courts of the Pacific commonwealths. In alleged support of this view, reference has been made, among others, to some New York decisions.<sup>1</sup> Into the discussion of this question I shall not at present enter. In the very recent case decided by the New York court of appeals,<sup>2</sup> described in our second chapter, the same position was urged by counsel. As a consequence, the common-law doctrine was examined by the court with much learning and ability, the early authorities were copiously cited, and the conclusions reached were in complete accordance with the common-law rules as they are universally understood at the present time by the courts of England and of the United States. The cases of *People v. Canal Appraisers*, and others like it, which seem to be antagonistic, it is shown are confined to the Mohawk and the Hudson rivers, the rights of riparian owners on these two streams being derived, not from the common law, but from the civil law, as it prevailed in the Netherlands during the colonial periods.

## § 22. Basis of right to appropriate water.

[Prior to the act of congress already referred to, there was no legislation emanating from the federal government which directly authorized the exclusive appropriation of water-courses on the public domain. The right of a miner to go upon the public lands of the United States, and there appropriate to his own use the water of a running stream, and to hold the same against any person who should subsequently attempt to divert it from him, could be based upon no grant, statute, or express permission. This right, if it was to receive legal recognition at all,

<sup>1</sup>For example, to *People v. Canal Appraisers*, 33 N. Y. 461.

<sup>2</sup>*Smith v. City of Rochester*, 92 N. Y. 463. In the case of *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 753, the supreme court of Califor-

nia remarked: "In examining the numerous cases which establish that the doctrine of appropriation is *not* the doctrine of the common law, we meet an embarrassment of abundance."

must be made to rest upon some other foundation than that of positive law. Hence the courts—in order to protect the vast interests which had grown up under the mining systems, and to give legal sanction to the rights thus acquired—invoked the common-law doctrine of presumption, and implied, from all the circumstances, a *license* from the United States to the appropriator of water, commensurate with any rights which he could justly claim. Thus it is said: “From a very early day the courts of this state have considered the United States government as the owner of running waters on the public lands of the United States, and of their beds. Recognizing the United States as the owner of the lands and waters, and as therefore authorized to permit the occupation or diversion of the waters as distinct from the lands, the state courts have treated the prior appropriator of water on the public lands of the United States as having a better right than a subsequent appropriator, on the theory that the appropriation was *allowed* or *licensed* by the United States.”<sup>1</sup>

### § 23. Grounds for presumption of license.

If we inquire as to the grounds on which this presumption of a license from the government is built, we shall find the question satisfactorily answered in an early decision of the California supreme court. It was observed by a learned judge: “One of the favorite and much-indulged doctrines of the common law is the doctrine of presumption. Thus, for the purpose of settling men’s differences, a presumption is often indulged where the fact presumed cannot have existed. In support of this proposition I will refer to a few eminent authorities.  
\* \* \* In these cases presumptions were indulged against the truth,—presumptions of acts of parliament and grants from

<sup>1</sup>Lux v. Haggin, 69 Cal. 255, 10 Pac. Rep. 721.

the crown. It is true the basis of the presumption was length of time, but the reason of it was to settle disputes, and to quiet the possession. If, then, lapse of time requires a court to raise presumptions, other circumstances which are equally potent and persuasive must have the like effect for the purposes of the desired end; for lapse of time is but a circumstance or fact which calls out the principle, and is not the principle itself. Every judge is bound to know the history, and the leading traits which enter into the history, of the country where he presides. This we have held before, and it is also an admitted doctrine of the common law. We must therefore know that this state has a large territory; that upon its acquisition by the United States, from the sparseness of its population, but a small comparative proportion of its land had been granted to private individuals; that the great bulk of it was land of the government; that but little as yet has been acquired by individuals by purchase; that our citizens have gone upon the public lands continuously from a period anterior to the organization of the state government to the present time. Upon these lands they have dug for gold; excavated mineral rock; constructed ditches, flumes, and canals for conducting water; built mills for sawing lumber and grinding corn; established farms for cultivating the earth; made settlements for the grazing of cattle; laid off towns and villages; felled trees; diverted water-courses; and, indeed, have done, in the various enterprises of life, all that is useful and necessary in the high condition of civilized development. All of these are open and notorious facts, charging with notice of them not only the courts who have to apply the law in reference to them, but also the government of the United States, which claims to be the proprietor of these lands, and the government of the state within whose sovereign jurisdiction they exist. In the face of these notorious facts the government of the United States has not attempted to assert any right of own-

ership to any of the large body of lands within the mineral region of the state. The state government has not only looked on quiescently upon this universal appropriation of the public domain for all of these purposes, but has studiously encouraged them, in some instances, and recognized them in all. Now, can it be said, with any propriety of reason or common sense, that the parties to these acts have acquired no rights? If they have acquired rights, these rights rest upon the presumption of a grant of right, arising either from the tacit assent of the sovereign, or from expressions of her will in the course of her general legislation, and, indeed, from both. Possession gives title only by presumption. Then, when the possession is shown to be of public land, why may not any one oust the possessor? Why can the latter protect his possession? Only upon the doctrine of presumption, for a license to occupy from the owner will be presumed."<sup>1</sup>

At the same time it must be remembered that there was never any license, *in fact*, from the government to the miners on the Pacific coast to work the mines. Congress had adopted no specific action on the subject. The supposed license consisted in the forbearance of the government; any other license would rest in mere assertion, and would be untrue in fact and unwarranted in law.<sup>2</sup>

### § 24. Efficacy of miners' customs.

It may not be inappropriate to add a few words to the account given by our author of the origin and nature of "mining customs."<sup>3</sup> It is said by the court in California: "It has always been held that local regulations, etc., accepted by the miners of a particular district, are binding only as to possessory rights

<sup>1</sup>Conger v. Weaver, 6 Cal. 556, 557.

<sup>2</sup>Boggs v. Merced Min. Co., 14 Cal. 355.

<sup>3</sup>*Supra*, § 14.

within the district, and that they must be proved as a fact. When they have been proved, the courts have considered them only for the purpose of ascertaining the extent and boundaries of the alleged possessions of the respective parties, and the priority of possessory right as between them, or for the purpose of ascertaining whether the right of action has been lost or abandoned by failure to work and occupy in the manner prescribed. When the priority, limits, and continuation of a possession have thus been ascertained, the courts have proceeded to apply the presumption of a grant from the paramount source,—a presumption, we repeat, sustainable on common-law principles.”<sup>1</sup> The principal efficacy of the mining customs, then, is this: that, where any local mining custom exists, controversies affecting a mining right must be solved and determined by the rules and usages of the bar or diggings embracing the claim to which such right is asserted or denied, whether such customs or usages are written or unwritten. Legislation, it is added, could not entirely supplant the force of these customs. They are of a different character from common-law customs; for the latter must be of immemorial tradition.<sup>2</sup> But a custom or usage is void whenever it falls into disuse, or is generally disregarded.<sup>3</sup> The existence of mining rules and customs is a question of fact; and it is further required that they should be reasonable.<sup>4</sup>

In Oregon, it is held that where a plaintiff alleges a right to appropriate water under a local custom, and such allegation is denied, he must prove the custom and a compliance therewith. The courts will not take judicial notice of local customs concerning water rights. Hence, to claim and hold water appropriated under a local custom, such as is recognized by the act

<sup>1</sup> *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 748.

<sup>2</sup> *Morton v. Solambo Copper M. Co.*, 26 Cal. 527.

<sup>3</sup> *Harvey v. Ryan*, 42 Cal. 626.

<sup>4</sup> *King v. Edwards*, 1 Mont. 235. And see *Irwin v. Phillips*, 5 Cal. 140, s. c. 63 Amer. Dec. 113.

of congress of 1866, the claimant must allege and prove a custom such as is named in that act.<sup>1</sup> In Arizona, on the other hand, the courts take judicial notice, without proof, of the "local customs, laws, and decisions of courts" relating to water rights, as these terms are used in the federal statute referred to.<sup>2</sup>

It remains to be added that the mining customs are recognized as valid and binding only when they are not in conflict with any constitutional or statutory provision, either of the state or the United States.<sup>3</sup> Thus, no custom of miners could legalize those effects of the system of hydraulic mining which have come to be regarded by the courts as a public nuisance. On this point it is said: "A custom or usage attempted to be established, whereby mining *debris* might be sent down to the valleys, devastating the lands of private owners, holding titles in fee from the Mexican government, as old as the title of the United States, without first acquiring the right to do so by purchase or other lawful means, upon compensation paid, would be in direct violation both of the laws and constitution of the state and of the constitution of the United States. Instead of being authorized by the statute, it would be in direct violation of the statute. It would also be in direct violation of the express provisions of the statutes defining nuisances."<sup>4</sup>]

<sup>1</sup> Lewis v. McClure, 8 Oreg. 273.

<sup>2</sup> Clough v. Wing, (Ariz.) 17 Pac. Rep. 453.

<sup>3</sup> Code Civil Proc. Cal. § 748, and

St. 1851, p. 149, § 621. See, also, Rev. St. U. S. §§ 2319, 2324.

<sup>4</sup> Woodruff v. North Bloomfield G. M. Co., 9 Sawy. 441, s. c. 18 Fed. Rep. 801.

## II. APPROPRIATION AS AGAINST THE SUBSEQUENT GRANTEE OF THE GOVERNMENT.

### § 25. Title of subsequent grantee is subject to prior appropriation.

Where a stream or lake was throughout its entire extent on the public land, the prior appropriator obtained a right, we have seen, good against all the world except the federal government. The government might have denied this right and treated it as non-existing. On the contrary, congress formally acknowledged it, and by the declaratory statute of 1866 made the national ownership of the public domain bordering on the stream or lake subject to the claims and uses of the prior appropriator. Wherever the title of the United States to any portion of the public domain was thus burdened, the same burden would, on general principles, accompany the title if transferred to any subsequent or private owner; whoever succeeded to the title of the United States, through any mode of acquisition or conveyance, would acquire and hold it subject to the same servitude which before existed in favor of the prior appropriator. This consequence would naturally follow from the operation of well-settled principles, independently of any express enactment; but it has not been thus left as a matter of inference. By an act of July 9, 1870, amending the statute of 1866, congress has provided "that all patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this is amendatory;" *i. e.*, act of July 26, 1866.



**§ 26. California decisions on this point.**

In the recent case of *Osgood v. El Dorado Water Co.*,<sup>1</sup> it appeared that the plaintiff, Osgood, first went upon a certain tract of public land bordering on a stream, in 1863, and had resided there ever since. The land at the time was unsurveyed. The land was surveyed by the government surveyor in 1865. The plaintiff filed his declaratory statement as a pre-emptor in June, 1868; in June, 1870, he had completed his payments; and on October 25, 1871, he received his patent from the United States. In March, 1867, the predecessors of the defendant had posted a notice of their appropriation of the waters of the same stream which ran through the plaintiff's tract. From that date they had been engaged in constructing a ditch or canal, and were in active prosecution of the work at the time plaintiff obtained his patent, although they did not finally complete it until some time after that date. The action was brought to restrain the defendant from diverting the water, based upon the plaintiff's asserted rights as a riparian owner. The court held that the plaintiff's rights accrued only from the date of his patent, and did not relate back to the time of his first settlement, or of his filing a declaration of pre-emption.<sup>2</sup> The defendant was thus in the position of a prior appropriator. In determining the rights of such an appropriator against a subsequent grantee from the United States, the court entered into no discussion of the question upon principle. It rested the decision wholly upon the statute of congress. Mr. Justice Ross said: "The principle of prior appropriation of water on the public lands in California, where its artificial use for agricultural, mining, and other like purposes is absolutely essential, which has all along been recognized and sanctioned

<sup>1</sup>56 Cal. 571, (1880.)

<sup>2</sup>In support of this conclusion the following cases were cited: *Megerle v. Ashe*, 33 Cal. 74; *Dan-*

*iels v. Lansdale*, 43 Cal. 41; *Smith v. Athern*, 34 Cal. 507; *Lansdale v. Daniels*, 100 U. S. 118.

by the local customs, laws, and decisions, was thus expressly recognized and sanctioned by the supreme court of the United States, and also by the act of congress of 1866." The same policy, he continues, led to the further act of 1870, previously quoted. "The defendant's grantors, therefore, had the right to appropriate the water in controversy, and, if they acquired a vested right therein prior to the issuance of the plaintiff's patent, the plaintiff's rights, by express statutory enactment, are subject to the rights of the defendant."

[This doctrine is now conclusively established upon the authorities. It is held that an appropriation of the use of water for mining or agricultural purposes, under established customs in the arid regions, and under the acts of congress, confers a vested right, and all subsequently acquired rights or titles are subject thereto. And it is said that "whoever purchases land from the United States or this state, after the whole or some part of the water of a natural water-course running through such land has been appropriated by some one else under the act of congress of July 26, 1866, or under the provisions of title 8 of the Civil Code of this state, takes subject to the rights acquired by such prior appropriator."<sup>1</sup> And when one obtains government land, he has a right to appropriate, for the purpose of irrigation and stock-raising, the waters of any stream flowing through government land which have not been previously appropriated by another, and in waters thus converted to his use he acquires a vested right which cannot be affected by those who purchase above or below

<sup>1</sup>Lux v. Haggin, 69 Cal. 255, 4 Pac. Rep. 924; Lytle Creek Water Co. v. Perdew, 65 Cal. 447, 2 Pac. Rep. 732; Judkins v. Elliott, (Cal.) 12 Pac. Rep. 116; South Yuba Water Co. v. Rosa, 80 Cal. 333, 22 Pac. Rep. 222; Ramelli v. Irish, (Cal.)

31 Pac. Rep. 41; Barnes v. Sabron, 10 Nev. 217; Speake v. Hamilton, 21 Oreg. 3, 26 Pac. Rep. 855; Hill v. Lenormand, (Ariz.) 16 Pac. Rep. 266; Drake v. Earhart, (Idaho,) 23 Pac. Rep. 541; Kirk v. Bartholomew, (Idaho,) 29 Pac. Rep. 40.

him.<sup>1</sup> And where an appropriator of water leads his ditch through the public lands, he, by the construction of his ditch and the appropriation and use of the water, acquires, as against a subsequent purchaser from the United States, as complete and perfect a right to maintain his ditch as though such easement had vested in him by grant.<sup>2</sup> And such subsequent purchaser will not be permitted, by obstructions on his own land, to divert the water from the ditch of the prior appropriator.<sup>3</sup> Where a person settles on unsurveyed public land, with the intention of acquiring title as soon as he can under the law, and appropriates water for its cultivation, such appropriation is effective from its date, though that may be several years before he succeeds in perfecting his title.<sup>4</sup>

### § 27. Views of United States supreme court.

In the case of *Broder v. Natoma Water Co.*,<sup>5</sup> the supreme court seems to have held, or at least to have intimated by the course of its reasoning, that the subsequent grantee from the government would take subject to the rights of the prior appropriator, even in the absence of the express declaration contained in the act of 1870. A person had made a prior appropriation from the water of a stream running through a portion of the public domain included in a tract of the public land, which was afterwards, and before the statute of 1870, granted by congress to a railroad company. As between this appropriator and a subsequent purchaser from the railroad company of another parcel on the same stream, it was held that such purchaser took his title subject to the prior appropriation, because the congress-

<sup>1</sup> *Kaler v. Campbell*, 13 Oreg. 596, 11 Pac. Rep. 301.

<sup>2</sup> *Ware v. Walker*, 70 Cal. 591, 12 Pac. Rep. 475.

<sup>3</sup> *Geddis v. Parrish*, 1 Wash. St. 587, 21 Pac. Rep. 314.

<sup>4</sup> *Elliott v. Whitmore*, (Utah,) 24 Pac. Rep. 673.

<sup>5</sup> 101 U. S. 274.

sional grant to the railroad company was expressly declared to be subject to all "lawful claims." Although this provision in the grant to the railroad was similar in its import to the more comprehensive statute of 1870, yet the reasoning of the court is largely based upon the rights of the appropriator of water acquired through the operation of local customs, and recognized and protected by the earlier legislation of 1866. The established doctrine of the court was said to be that the "rights of miners who had taken possession of mines, and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged, and was bound to protect, before the passage of the act of 1866."

### § 28. The act of 1870 is declaratory only.

Where a private person can thus acquire a right of property in the water of a public stream, or, if not an absolute right of *property*, at least a right in the nature of an easement or servitude to use the water, which is good against the United States, as proprietor of the remaining tract of land through which the stream flows, it would seem to follow, as a necessary result of the common-law doctrines concerning the devolution of title, that the same right would remain good and attached to the stream, as against any and all subsequent proprietors who may acquire title from and under the government to all or to any part of the public lands bordering upon, adjacent to, or situated near the same stream. In other words, it would seem that the statute of 1870 should be construed as simply declaratory of a familiar legal doctrine, and not as circumscribing or restricting such doctrine. If the language of such statute be found to be too narrow or incomplete to afford, of itself, a sufficient

protection to the claims of prior appropriators against subsequent owners, then the courts may fall back, if necessary, upon the broader principles of the common law. In this connection, it will be important to determine who are grantees or owners acquiring title from and under the United States. While the statute should be liberally construed in favor of the prior appropriators, it should also be fairly and equitably interpreted in ascertaining who are the grantees and owners holding title to the public domain under the government. The discussion of this question belongs, however, to a subsequent portion of our essay.<sup>1</sup>

### § 29. Public lands of the state.

The rules thus far considered are avowedly confined in their operation to the public lands of the United States. The first contemplates an appropriation from the water of a stream or lake while it lies wholly in the public domain, before any titles of tracts adjacent to it have been acquired by other persons. The second renders a prior appropriation, thus made, valid and ef-

<sup>1</sup> [At the same time it must be remembered that a grant of public land of the United States carries with it the common-law rights to an innavigable stream thereon, unless the waters are expressly or impliedly reserved by the terms of the patent, or of the statute granting the land, or unless they are reserved by the congressional legislation authorizing the patent or other muniment of title. To this point the supreme court of California speaks as follows: "And if the United States since the date of the admission of the state has been the owner of the innavigable streams on its lands, and of the

subjacent soils, grants of its lands must be held to carry with them the appropriate common-law use of the waters of the innavigable streams thereon, except where the flowing waters have been *reserved* from the grant. To hold otherwise would be to hold, not only that the lands of the United States are not taxable, and that the primary disposal of them is beyond state interference, but that the United States, as a riparian owner within the state, has other and different rights than other riparian owners, including its own grantees." *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 722.]

fectual as against private persons who subsequently acquire, from the general government, titles to portions of the public land bordering on the same lake or stream. The question is at once presented whether the same rules apply to the public lands of the state, as well as to those of the United States. The United States has, through congressional legislation, donated to individual states—to California, for example—large tracts of the original public domain, under the name of “tide-water,” “swamp,” and “overflowed” lands. Over such lands the state has, of course, both the proprietary rights of an owner, and the governmental rights of a political sovereign; while over its public lands within the territory of a state the United States has only the rights of a proprietor. If a stream was wholly situated on such public lands of California, and an appropriation should be made of its waters for irrigating, agricultural, or manufacturing purposes, before any other private persons had acquired title to tracts bordering upon its banks, would this prior appropriation be valid against the state, and also against other riparian proprietors holding titles subsequently obtained from the state? This is an important question, but its discussion will be more appropriate in connection with subsequent topics. It is enough now to say that the considerations which led to the adoption of the rules previously laid down concerning the public lands of the United States would seem to apply, with at least an equal force, to the lands owned by the state. The federal government, through its congress and its courts, has avowedly carried out a policy which was inaugurated by the legislative and judicial decisions of the state. As the doctrine of prior appropriation on the public lands of the United States originated from a policy recognized, favored, and promoted by state authority, and as similar needs exist and similar reasons apply in connection with the public lands of the state, it seems to be a natural, even if

not an inevitable, consequence, that the same doctrine should be extended to those lands, as against the state itself and its subsequent grantees.<sup>1</sup>

### III. THE RIGHT RESTRICTED TO THE PUBLIC DOMAIN.

#### § 30. Appropriation confined to public lands.

Whatever rules may be adopted by the statutes or the decisions of a particular state, with reference to the rights of riparian proprietors who have acquired titles to all the lands on the borders of a stream, before any appropriation of its waters had been made while these were public lands,—even though the state might by its statutes or decisions expressly extend the same doctrines to all such proprietors,—still the two doctrines, heretofore described as originating from the local customs of miners

<sup>1</sup>[The position taken in the text is strongly supported by a very important decision lately rendered by the supreme court of California. In *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 775, it is said: "The citizens of the state have never been prohibited from entering upon the public lands of the state. The courts have always recognized a right in the prior possessor of lands of the state as against those subsequently intruding upon such possession. The same principle would protect a prior appropriator of water against a subsequent appropriator from the same stream. It is not important here to inquire whether, as against a subsequent appropriation of water, a prior appropriator of land, through which the stream may run, would have the better right. It is enough to say that, as between two per-

sons, both mere occupants of land or water on the state lands, the courts have determined controversies. The implied permission by the general government to private persons to enter upon its lands has been assumed to have been given by the state with reference to the lands of the state; and the state, for the maintenance of peace and good order, has protected the citizen in the acquisition and enjoyment on its lands of certain property rights obtained through possession, — perhaps the mode by which all property was originally acquired. In view of these facts, we feel justified in saying that it was the legislative intent to exclude as well the state as the United States from the protection which is extended to riparian proprietors by section 1422 of the Civil Code."]

and sanctioned by the legislation of the state and of congress, are confined in their operation to the public domain of the United States. All extension of these doctrines to other lands and other proprietors, and all additional rules, must necessarily proceed from the states themselves. [It is accordingly held that the federal statute, heretofore referred to, applies only to government lands, and does not give the right to appropriate water on lands already held in private ownership.<sup>1</sup> And in favor of one's claim of right in the waters of a stream by appropriation there is no presumption that, at the time of the appropriation, the lands were public lands.<sup>2</sup>]

### § 31. Jurisdiction of state and United States distinguished.

It should be observed, in this connection, that the United States government has no power whatever to prescribe for its grantees any general rules of law concerning the use of their lands, or of the lakes and streams to which they are adjacent, binding upon its grantees of portions of the public domain situated within a state, and becoming operative after they have acquired their titles from the federal government. The power to prescribe such rules, forming a part of the law concerning real property, belongs exclusively to the jurisdiction of the states. Over its public lands situate within a state, the United States has only the rights of a proprietor, and not the legislative and governmental rights of a political sovereign. Even with respect to the navigable streams within a state, the powers of the federal government are limited, and *a fortiori* that is so with respect to streams which are innavigable. In the great case of *Pollard's Lessee v. Hagan*,<sup>3</sup> the authority of the United States over its

<sup>1</sup> *Curtis v. La Grande Water Co.*,  
20 Oreg. 34, 23 Pac. Rep. 808.

<sup>2</sup> *City of Santa Cruz v. Enright*,  
95 Cal. 105, 30 Pac. Rep. 197.

<sup>3</sup> 3 How. 223.



public lands within a state was thus defined by the supreme court: "When Alabama was admitted into the Union, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States. Nothing remained in the United States, according to the terms of the agreement, but the public lands. And, if an express stipulation had been inserted in the agreement granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain within the limits of a state, except in cases in which it is expressly granted. \* \* \* In the case of *Martin v. Waddell*,<sup>1</sup> the present chief justice, in delivering the opinion of the court, said: 'When the revolution took place, the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution.' To Alabama, then, belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the constitution to the United States." Recognizing the power of the United States over such navigable streams for the purpose of regulating commerce, the court adds: "The right of eminent domain over the shores and the soils under the navigable waters, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. \* \* \*" Summing up its conclusions, the court said: "*First*, the shores of navigable wa-

<sup>1</sup>16 Pet. 410.

ters, and the soils under them, were not granted by the constitution to the United States, but were reserved to the states respectively; *secondly*, the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states; *thirdly*, the right of the United States to the public lands, and the power of congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case."

**§ 32. Power of government to annex conditions to grants.**

Over the public domain within a state, and the innavigable streams and lakes situated thereon, the United States has therefore only the rights of a proprietor. Undoubtedly, as held in the case of *Union Mill & Min. Co. v. Ferris*,<sup>1</sup> by virtue of its proprietorship, the United States has a perfect title to the public domain, and an absolute and unqualified right of disposal; and neither a state nor a territorial legislature can modify or affect, in any manner, the right of the federal government to the *primary* disposal of the public land. Also an innavigable stream or lake, lying within the public domain, is a part and parcel of the land itself, inseparably annexed to the soil, and the use of it is an incident to the soil, and as such passes to the patentee of the soil from the United States. As the federal government, in conveying any particular portion of its public domain within a state to a particular grantee, may as proprietor annex any conditions to the conveyance, so that the title will be taken and held subject thereto, so it may, by congressional legislation, adopt any general regulations imposing any conditions or limitations upon the use of the public domain by all persons, or upon all persons who acquire title to portions of the public domain from the government, and the titles so acquired will be

<sup>1</sup> 2 Sawy. 176, before Sawyer and Hillyer, JJ.

held by the grantees thereof subject to such conditions and limitations. Thus, congress may provide, by general statute, for a right of way over the public lands unsold, for the ditches and canals of those who have made a prior appropriation of water, and that all grantees who subsequently acquire portions of this land shall take and hold their titles subject to such existing rights of way; or that all grantees of the public lands bordering upon a stream shall take and hold their titles subject to any previously existing appropriation of its water; or that all grantees of the public lands shall take their titles subject to the local customs or laws of the state within which the lands are situated, concerning the uses of water for mining, irrigating, agriculture, and other purposes. Congress has, in fact, adopted such legislation, prescribing rules concerning the disposition of public lands, and imposing conditions or limitations upon the titles obtained by purchasers. By one section of the act of 1866, already mentioned, it is enacted:<sup>1</sup> "As a condition of sale, in the absence of necessary legislation by congress, the local legislature of any state or territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; *and those conditions shall be fully expressed in the patent.*" The patent here spoken of is clearly that issued by the United States to the purchasers and other grantees of the public domain, and such grantees take their titles subject to easements and other similar rights held by other persons under the customs and laws of the state.<sup>2</sup> This power of the United States to impose conditions and limitations upon the use of the lands within a state, which were originally public, is confined to their *primary* disposal to its immediate grantees. If, therefore, the public land bordering upon a stream, and situate

<sup>1</sup> Rev. St. U. S. § 2338.

<sup>2</sup> See the observations of Sawyer, J., in *Woodruff v. North Bloom-*

*field G. M. Co.*, 9 Sawy. 441, s. c., 18 Fed. Rep. 801.

within a state, should all be conveyed to private persons, free from any conditions or limitations, congress would have no power to control such persons in the use of their lands or in the use of the stream upon which their lands border. The power to legislate and to prescribe rules under these circumstances belongs exclusively to the state, as a part of its supreme municipal authority over persons and property within its jurisdiction.

#### IV. CONFLICTING CLAIMS BETWEEN SETTLERS AND APPROPRIATORS.

### § 33. Converse of doctrine of appropriation.

It has already been shown that the prior appropriation of water wholly upon the public lands of the United States is good against subsequent grantees or patentees of tracts upon the same stream or lake deriving their titles from the federal government.<sup>1</sup> It follows, by necessary implication from this statute, as well as on general principle, that if a person has acquired title from the United States to a tract bordering upon a stream or lake lying within the public domain, before an appropriation has been made of its waters, any subsequent appropriation of its waters, made by another person, in pursuance of the local customs or laws recognized by the legislation of the state and of congress, must be subject to such prior title, and to the riparian rights belonging to the holder thereof.<sup>2</sup> [And it is held that a rightful occupant of public land can acquire a water right which will become appurtenant thereto, although the land was unsurveyed, and he had no legal title, when the right was acquired.<sup>3</sup> So also, one who acquires his right to a water ditch and water right through public land, under the act of congress of 1866,

<sup>1</sup> See *ante*, §§ 25-28; Act Cong. July 9, 1870.

<sup>2</sup> *Union Mill & M. Co. v. Ferris*, 2 Sawy. 176; *Union Mill & M. Co. v. Dangberg*, Id. 450; *Vansickle v.*

*Haines*, 7 Nev. 249; and see *Crandall v. Woods*, 8 Cal. 136; *Leigh Co. v. Independent Ditch Co.*, Id. 323.

<sup>3</sup> *Ely v. Ferguson*, 91 Cal. 187, 27 Pac. Rep. 587.

but after the grant of a right of way to a railroad company, takes subject to the prior right of the railroad and cannot recover the damages that may be necessarily occasioned to him by its entry on its right of way.<sup>1]</sup>

### § 34. When title from United States is perfected.

When does a person thus acquire a title from the United States, within the meaning of this rule, so that any subsequent appropriation of water shall be subject thereto? The legislation of congress provides for various modes of acquiring title to public lands by different classes of persons,—by ordinary actual purchasers, by pre-emptors, by homestead settlers, and the like. In all these instances the claimant is required to do certain preliminary acts,—to file a declaration or notice, to make a location, to pay the purchase price, and the like; and after all these acts have been duly performed by him, including the payment of the price, if necessary, he is entitled to receive a patent from the government, which is executed and delivered to him by the proper officer, usually after some lapse of time. In all cases these steps must be taken in respect to land which has been surveyed by the government, or else the whole proceeding is nugatory. Wherever a patent is required by the legislation, no *legal* title passes to and vests in the purchaser, occupant, or other grantee until the patent is executed and delivered; the patent alone is the final conveyance of the legal estate. If, however, the settler, pre-emptor, or purchaser has duly complied with all the requirements of the statute, including, if necessary, the payment of the purchase price, so that nothing is left to be done by him in order to entitle him to a patent, he certainly acquires an equitable estate in the tract of land,—an equitable estate which the courts will and do protect. When a person has thus

<sup>1</sup>Bybee v. Oregon & C. R. Co., 139 U. S. 663, 11 Sup. Ct. Rep. 641.

done all that he is required to do, and all that he can do to perfect his title, and must await the convenience or leisure of the proper governmental official in obtaining the conveyance which clothes him with a complete legal estate, it would be in the highest degree unjust and inequitable if his rights, as a prior purchaser or grantee from the government, could be postponed, or endangered, or in any way prejudiced or affected, by a delay in the actual execution and delivery of the patent to him.

### § 35. When patentee's riparian rights vest.

We thus reach a conclusion which is in accordance with the plainest principles of equity, that the rights of a prior purchaser or grantee of public land from the government, as against any subsequent appropriator of water, become vested and perfect, *at least* from the time when he has duly performed all the statutory requirements, including, if necessary, the payment of the purchase price, which entitle him to a patent or other final conveyance or evidence of his legal title, and not merely from the time when he actually receives his patent or other final conveyance. Whether his rights are not even more extensive; whether, after he has duly performed all the statutory requirements, and has perfected his title by obtaining a patent, his rights as a prior grantee, purchaser, or owner do not relate back to the date of the first or initiative act in the whole continuous proceeding,—is another question which will be separately examined.

### § 36. Review of the authorities on this point.

The above proposition, that the prior rights of the grantee, purchaser, or private owner under the government are at least vested and complete, as against any subsequent appropriator of water, by the due performance of all the preliminary steps, including payment, which entitle him to a patent, and do not originate solely from the patent nor attach only from the date

of its delivery, seems to be fully settled by the decisions. In *Union Mill & Min. Co. v. Dangberg*,<sup>1</sup> the court held that one who has entered a tract of the public lands, under the provisions of the statutes of congress, and has fully paid for it, and has received the certificate of purchase from the governmental official, becomes vested with the equitable title, and as such equitable owner is entitled to all the water rights of a riparian proprietor, even though he has not yet received a patent. Also that one who has duly entered a tract of land in conformity with the requirements of the homestead act, and continues to reside thereon, becomes entitled to the water rights held by any riparian owners. And, in general, a person who entered and paid for a tract of the public lands before the act of 1866, holds his land unaffected by that act, since his patent will relate back to the date of his entry,—the inception of his title.

In the very important case of *Vansickle v. Haines*,<sup>2</sup> the supreme court of Nevada decided the following general propositions: As the United States has an absolute and perfect title to, and unqualified property in, the public lands; and as running water is an incident to or part of the soil over which it naturally flows,—a patent given to a private person—in the absence of any special limitations or exceptions or easements contained in the instrument itself, or created by statute—carries not only the unincumbered fee of the soil, but the stream naturally flowing through it, and the same rights to its use, or to recover for a diversion of it, as the United States or any other absolute owner could have. An owner of land over which a stream naturally flows has a right to the benefits which the stream affords, independently of any particular use; that is, he has an absolute and complete right to the flow of the water in its natural channel, and the right to make such use of the water, *when he chooses*,

<sup>1</sup> 2 Sawy. 450; and see *Union Mill & M. Co. v. Ferris*, 2 Sawy. 176.

<sup>2</sup> 7 Nev. 249.

as will not damage others located on the same stream and entitled to equal rights with himself. A patent to land from the United States, in the absence of any statutory or other limitations, carries with it a natural stream running through the land as an incident thereto, together with the right to have it returned to its channel if diverted. It follows, therefore, in the absence of special legislation to the contrary, that a pre-emptioner, while occupying and improving one quarter section of the public land, has no right to enter upon another quarter section, to which he makes no claim, and divert from it a valuable stream of water for the benefit of the land which he is claiming. In regard to the general doctrine of riparian rights among the various proprietors of private lands on the borders of a stream, the court holds that the territorial statute, adopting the common law of England, was ratified and embraced by the state constitution; that the common-law doctrine as to running water allows all riparian proprietors to use it in any manner not incompatible with the rights of others, so that no one can absolutely divert all the water of a stream, but must use it in such a manner as not to injure those below him; that the early decisions of Nevada, and those of California, holding that priority of appropriation gave a right to the use of water, were made in cases where there was no title to the soil, *and have no bearing in cases where absolute title has been acquired.*

In *Leigh v. Independent Ditch Co.*<sup>1</sup> the complaint alleged that the plaintiffs were owners and in possession of a certain tract of mining land through which a natural stream flowed, and that defendants had diverted the waters thereof to their injury, and prayed relief. Defendants demurred to this complaint, on the ground that it did not allege any appropriation or use of the waters by the plaintiffs. The court said: "The

<sup>1</sup>8 Cal. 323, (1857.)



demurrer was properly overruled. The allegation that the plaintiffs were the owners and in the possession of the mining claims [the tract of land] was sufficient. And the ownership and possession of the 'claims' draw to them the right to the use of the water flowing in the natural channel of the stream. The diversion of the water was therefore an injury to the plaintiffs, for which they could sue. The principle involved in this case was expressly decided by this court in the case of *Crandall v. Woods*.<sup>1</sup> In that case it was said: 'One who locates upon public lands, with the view of appropriating them to his own use, becomes the absolute owner thereof, as against every one but the government, and is entitled to all the privileges and incidents which appertain to the soil, subject to the single exception of rights antecedently acquired.'"

The conclusion heretofore reached, that the rights of a prior grantee or purchaser from the United States, as against subsequent appropriators of water, must be regarded as complete and perfect, at the latest, from the time when he has fully performed all of the statutory requirements, including payment, which entitle him to a patent, and not from the time of his receiving a patent, may appear, perhaps, to conflict with the recent decis-

<sup>1</sup> 8 Cal. 136, (1857.) The point actually decided in this case is, of course, authoritatively settled by the later utterance of the same court made in the subsequent case, as quoted above in the text. A perusal of the opinion in *Crandall v. Woods* would leave it doubtful, to say the least, in the absence of the subsequent interpretation, whether such a point was *decided*. Some portions of the opinion seem to intimate—even if they do not expressly hold—that the mere *prior ownership* and *possession* of a tract of land upon a stream do not render the proprietor's rights to

the waters thereof perfect, or at least do not entitle him to any relief against a diversion of such waters by another person; that even the *prior owner* of the land must have made some actual appropriation of the water to his own uses, before he can maintain an action against the diversion by another person whose claim is subsequent to his own. In other words, that *mere prior ownership* of riparian lands does not confer full and perfect riparian rights to the water. See, also, to the same effect, *Nevada Co. & Sac. Canal Co. v. Kidd*, 37 Cal. 282.

ion in *Osgood v. El Dorado, etc., Co.*;<sup>1</sup> but a careful examination of that case shows that no such conflict was intended, and none could legitimately arise upon the facts. The plaintiff relied upon the doctrine of relation, in order to carry his right back to his *first* proceedings, which were earlier than those of the defendants, and the court simply held that on the facts the doctrine of relation did not apply. The plaintiff's *first* step was taken while the lands were unsurveyed; and his earliest legiti-

<sup>1</sup>56 Cal. 571, 578. My reference to this decision on a previous page (*ante*, § 26) does not describe it with perfect accuracy, and needs some correction. It is true that the reporter's head-note represents the court as laying down the following general rule: "In a question of priority of right between an appropriator of water on the public lands and a pre-emptor, the rights of the latter date from the issuance of his patent." It is also true that Mr. Justice Ross says, in his opinion: "The plaintiff's rights must therefore be held to have attached on the twenty-fifth of October, 1871, the date of the issuance of his patent." But this language cannot have been intended to lay down a general rule applicable to all pre-emptors; it must have referred entirely to the particular facts of that case. This plainly appears from the sentence immediately preceding, and from the cases which he cites in support of his conclusion,—these very cases recognizing the rule that a grantee's right *may* relate back to a date before that of his patent. He says: "The plaintiff seeks to invoke the doctrine of relation; but for obvious reasons no case was made for the application of that doctrine." The plaintiff took

possession of his land several years before it was surveyed. It was surveyed in 1865. In June, 1868, he filed his first declaration as a pre-emptor; in 1870 he had paid up; and in 1871 he received his patent. But the defendants had taken their first step, from which their rights of appropriation arose, in March, 1867. It thus appears that, even if the plaintiff's title did relate back to the date of his declaration in 1868, it was still subsequent to defendants' right of appropriation, which accrued in 1867. The remark that plaintiff's title attached at the date of his patent was not, therefore, essential to the decision actually made on the facts. [But a recent authority speaks of this case in the following language: "*Osgood v. Water Co.* presented a question of priority between an appropriator of water on lands of the United States and a pre-emptioner. It was there held that, by reason of the express language of the seventeenth section of the act of congress of July 9, 1870, amending the act of July 26, 1866, the rights of the pre-emption claimant, as against an appropriator, date only from his patent or certificate of purchase." *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 782.]

mate proceeding was subsequent to the date at which defendants' rights of appropriation accrued.

In *Farley v. Spring Valley Min., etc., Co.*<sup>1</sup> the plaintiff, a pre-emptor, had settled on public lands of the United States, and filed his declaratory statement on February 27, 1871; he had proved up and paid the purchase price in 1877; and he received his patent on January 23, 1879. The defendants made an appropriation of water after 1871, but before 1877. The court held that the plaintiff's rights as a private proprietor only accrued in 1877, when he had proved up and paid the price; and he was therefore a subsequent purchaser as against a prior appropriation of the defendants. This case clearly recognizes the doctrine that the rights of a grantee or purchaser from the United States, as against another party claiming under the government, do not accrue from the time of executing and delivering his patent alone; but are complete when his equitable estate is perfected by his performing all of the requisites which entitle him to receive a patent.

The rights of the prior owner of a tract bordering on a stream, as against a subsequent appropriator of its waters upon the public domain, are impliedly, even if not expressly, recognized by other decisions. In *Gibson v. Puchta*,<sup>2</sup> the court held that when the title of two parties to public mineral lands is based on possession alone, the older possession gives the better title as between the two, even though the elder possessor uses his land for agriculture and the younger for mining. In such a case, their rights, as against each other, depend upon the common-law doctrines applicable to adjoining land-owners. The agricultural occupant has a right to use the water for the purpose of irrigating his own land in a proper and reasonable manner, and no cause of action can arise against him for such use,

<sup>1</sup> 58 Cal. 142.

<sup>2</sup> 33 Cal. 310.

even though the mining occupant may sustain some injury therefrom; he would only be liable for a negligent or willful injury done to the other occupant by means of his irrigation. What is thus true of an occupant whose title to a riparian tract of the public lands rests wholly upon a prior possession, must certainly be true of an owner whose title to such a tract rests upon a prior patent, conveyance, or other grant from the United States.

### § 37. Riparian rights protected.

In *Wixon v. Bear River, etc., Co.*,<sup>1</sup> the court held that if a tract of land on the bank of a stream in the mineral regions is inclosed and appropriated for the purposes of a garden or orchard, and the water of the same stream is afterwards appropriated by another person for mining purposes, at a point above the tract, the water subsequently appropriated must be used so as not to injure the garden, orchard, or fruit trees; that one who incloses a tract of public land in the mineral regions, and plants it with fruit trees, acquires a vested right therein, and a subsequent appropriator must use the water for mining purposes so as not to disturb such vested right, or destroy or injure the garden or orchard.

The rights of a private owner who has obtained a full title to a tract of land bordering upon a stream have been stated by quite recent decisions of the California supreme court. "As being owners of the land, the plaintiffs have an interest in the living stream of water flowing over the land; their interest is called

<sup>1</sup>24 Cal. 367; and see *Rupley v. Welch*, 23 Cal. 453; *Hill v. Smith*, 27 Cal. 476. The right of the prior occupant was here merely possessory as against the United States. An early statute of California seems to have given miners a right

to enter upon the lands of prior occupants used solely for *farming* purposes, when situated in the mineral regions; the interest of such occupants being only possessory.

the 'riparian right.' Under settled principles, both of the civil and the common law, the riparian proprietor has a usufruct in the stream as it passes over his land."<sup>1</sup> In *Creighton v. Evans*<sup>2</sup> the same court held that the right of a riparian private owner to have the water of the stream run through his land is a vested right, and any interference with it by another person gives him a cause of action for appropriate relief; that a diversion of the water by one who is *not* a riparian proprietor on the same stream is a legal wrong to the person who is such a riparian owner; that a person who is *not* a riparian proprietor has no right to take any water from the stream, even if enough is left for the uses of the riparian owner,—even if the latter has sustained no actual damage from the diversion.

### § 38. Doctrine of relation applied to patentees.

It having been shown that the rights of a patentee from the United States, as a prior purchaser or owner, relate back at least to the time when he has duly performed all the acts, including payment, which entitle him to a patent, the question still remains whether his rights do not in fact relate back to the date of his first or initiative step in the course of proceedings prescribed by congress,—as in case of a pre-emptor, to the filing of his declaratory statement.

### § 39. Grounds for the application of this doctrine.

This question arises in the construction and application of general statutes of congress, which were intended to encourage actual settlers and occupants of the public lands, by providing a means for such actual settlers to acquire the private ownership of tracts of land, and for such actual occupants to acquire the right to divert and use the waters of streams. The same policy plainly underlies the whole system of legislation. When any

<sup>1</sup>Pope v. Kingman, 54 Cal. 3, 5.

<sup>2</sup>53 Cal. 55.

conflict arises between parties seeking to avail themselves of these different statutes, — between parties seeking to acquire tracts of land under one set of statutes and parties seeking to acquire water rights under another,—it would seem to be just and reasonable that the same principle or method of construction and interpretation should be extended to all these statutes in determining the rights of such conflicting claimants. In respect to the appropriator of water on the public lands, when he has duly posted and given the notices of his appropriation, and has followed up this initiative by proceeding to construct his ditches, dams, and other works with reasonable diligence, and without unreasonable delay, his right of appropriation, when his works are thus completed, relates back to the date of his first or preliminary act.<sup>1</sup> This rule seems to be fully settled. In cases of conflict as to priority of right between such appropriator of water and a patentee of land from the United States, it would seem to be just and reasonable that the same rule of interpretation should be extended to the other similar legislation of congress by which private persons are authorized to acquire title to portions of the public domain as pre-emptors, homestead occupants, and the like. Congress has given no intimation of a policy more favorable to the use of water on the public domain than to the use of the public lands for all other beneficial purposes. In the absence of decisions, it would naturally be supposed that the same rule should be applied to all persons who acquire rights under this system of legislation, in determining any conflict which may arise between them.

#### § 40. California decisions.

The decisions dealing or appearing to deal directly with this question are very few. In California the rule is settled *against* the claims of a pre-emptor who has received his patent from the

<sup>1</sup>See *Osgood v. El Dorado, etc., Co.*, 56 Cal. 571.

United States, so far as it can be put at rest by one decision. In *Farley v. Spring Valley M. & I. Co.*,<sup>1</sup> the plaintiff, a pre-emptor, settled on government land; filed his declaratory statement February 27, 1871; proved up and paid in 1877; and obtained his patent January 23, 1879. The defendants made an appropriation of water which began after 1871, but before 1877. The plaintiff's right was held to have begun only in 1877, when he had "proved up and paid," and he was therefore a subsequent purchaser to the defendant. This decision was rested upon the following grounds: The public land belonged to the United States until the plaintiff had proved up and paid in 1877. Until that time congress had full power to withdraw the land from sale, and to sell or grant it to another. Certain cases were cited as expressly sustaining these conclusions.<sup>2</sup>

### § 41. Review of the cases.

With great respect for the able court which rendered this decision, and deference to its learning and ability in all questions connected with governmental land titles, I think that the matters actually decided in *Frisbie v. Whitney*, *Hutton v. Frisbie*, and *Western Pac. R. R. v. Tevis* do not sustain the conclusion which they reached in *Farley v. Spring Valley M. & I. Co.*; that a careful examination of these prior cases will show that they dealt with an entirely different state of facts, and an entirely different kind of legislation; and that the opinions in these cases avowedly

<sup>1</sup>58 Cal. 142.

<sup>2</sup>Namely, *Frisbie v. Whitney*, 9 Wall. 187; *Hutton v. Frisbie*, 37 Cal. 475; *Western Pac. R. R. v. Tevis*, 41 Cal. 489. The court also held that under the acts of congress, July 26, 1866, and July 9, 1870, the defendants obtained "existing rights" to construct and use their reservoir, which were excepted

and saved in the patent issued to the plaintiff; citing *Jennison v. Kirk*, 98 U. S. 460; *Broder v. Natoma, etc., Co.*, 50 Cal. 621. Of course the real question was whether the defendants had any such "existing rights" at the time when the right of the plaintiff first accrued and became vested *as against the defendants*.

and carefully except and exclude from their operation such questions as that of priority of right between a pre-emptor and an appropriator of water, arising under the general statutes of congress concerning the disposition of the public lands among private proprietors or occupants. In order to understand the exact points decided by the United States supreme court in *Frisbie v. Whitney*, and the character of the legislation to which it relates, a brief statement of the material facts is necessary. A certain person, whom I will designate as A., held a Mexican grant to a large tract of land in California. This grant was for years supposed to be perfectly valid, and A.'s title as perfectly good. He had from time to time sold and conveyed portions of it to divers purchasers, who had for years held possession of their farms, inclosed them, built on them, planted orchards, and otherwise improved them, under the supposition that the titles obtained from A. were valid. At length the supreme court of the United States decided that the grant to A. was null and void, and the land included in such grant was therefore the public domain of the United States, subject to all of the general statutes of congress concerning the public domain. Immediately upon the rendition of this decision, a great number of persons rushed onto the tract, and, disregarding the rights of the prior occupants, proceeded to locate claims as pre-emptors upon it, upon the improved and cultivated and occupied portions, to file their declaratory statements, and to take the other steps necessary, under the general statutes, in order to secure their titles as pre-emptors of the public lands. This proceeding was a palpable wrong to the *bona fide* and innocent occupants who were thus dispossessed. In this condition of facts, congress interfered, after the pre-emptors had filed their declaratory statements, but before they had paid the price so as to be entitled to patents, and by a special statute, applicable to the lands included in A.'s grant, withdrew those lands, or at least such portions of them as had



been sold to *bona fide* purchasers, from sale or pre-emption under the general statutes, and confirmed and established the rights and titles of such prior *bona fide* purchasers holding under A.'s grant, as against the claims of the pre-emptors who had located tracts and filed declarations, but had not yet proved up and paid. A controversy arose concerning the ownership of a certain tract between a pre-emptor and a prior purchaser and occupant under A.'s grant, which the supreme court of the United States finally decided in the case of *Frisbie v. Whitney*.<sup>1</sup> As the reporter's head-note accurately describes the questions passed upon by the court, it will be sufficient to quote it, without giving more elaborate extracts from the opinion. It will be seen that all the equities were strongly in favor of the prior occupants and against the pre-emptors. The head-note is as follows: "Occupation and improvement on the public lands, with a view to pre-emption, do not confer a *vested right* in the land so occupied, [*i. e.*, as the rest of the case plainly shows, a vested right against the United States.] It *does* confer a preference over others in the purchase of such land by the *bona fide* settler, which will enable him to protect his possession against other individuals, and which the land-officers are bound to respect. This inchoate right may be protected by the courts against the claims of other persons who have not an equal or superior right, but it is not valid against the United States. The power of congress over the public lands, as conferred by the constitution, can only be restrained by the courts, in cases where the land has ceased to be government property by reason of a right vested in some person or corporation. Such a vested right, under the pre-emption laws, is only obtained when the purchase money has been paid, and the receipt of the proper land-officer given to the purchaser. Until this is done, it is within the legal and constitutional competency

of congress *to withdraw the land from entry or sale, though this may defeat the imperfect right of the settler.*" The case of *Hutton v. Frisbie*<sup>1</sup> was an exactly similar controversy, growing out of the very same transaction, involving exactly the same questions, which the supreme court of California decided in the same manner. In *Western Pac. R. R. v. Tevis*<sup>2</sup> the court held, for the same reasons, that congress has power, by a special statute giving the right of way over the public lands of the United States to a railroad company, to include within such statutory grant, and thus convey to the railroad, portions of the public lands which pre-emptors had previously entered, located, and claimed, under the pre-emption laws, but for which they had not yet paid and received certificates of purchase.

It is plain that the courts do not intend, in these three cases, to touch upon the question, to what period or stage of his preliminary proceedings does the right of a pre-emptor, (or other purchaser,) *after he has received his patent*, relate back, in a contest as to priority with another person claiming title under the *general* legislation of congress? These cases simply hold that a pre-emptor who has merely located a tract of the public land, occupied it, and filed the preliminary declaration, but has not yet paid the price, obtains no vested right therein against the United States; and that congress may, therefore, by some special statute exercise *its* continuing rights of ownership over such tract, withdraw it from entry, location, settlement, or sale under the operation of the general legislation, and may sell or donate or grant such tract to another person, without regard to the inchoate and imperfect right to it of the pre-emptor. The conflicting rights of two persons claiming under different provisions of the *general* statutes of congress concerning the acquisition of private titles or interests in the public lands,—general stat-

<sup>1</sup>37 Cal. 475.

<sup>2</sup>41 Cal. 489.

utes which were dictated by and carry out the same liberal policy,—present, in my opinion, another question, which, I would most respectfully but earnestly submit, is not embraced within nor passed upon by the three decisions above described, and which were cited and relied upon in *Farley v. Spring Valley M. & I. Co.*<sup>1</sup> Those cases deal with the interest of a pre-emptor before he obtains a patent, and before he has paid the price, not with his interest *by relation* after the patent is delivered. Even *that* inchoate interest is not a mere nullity. While it is not, in its imperfect condition, a perfect and vested right to the land as against the United States, the supreme court pronounces it to be an existing right which the courts will protect against third persons who have no superior or equal claims. When are the claims of third persons, derived from other portions of the *general* system of legislation concerning the acquisition of private ownership in the public lands, superior or equal to the inchoate right of the pre-emptor? It seems to me that *this* question is carefully distinguished by the decisions above quoted, and excepted from their operation; that those decisions are confined to a special act of congress directly *withdrawing* specific portions of the public lands from the operation of such general legislation as the pre-emption laws, and do not touch upon the effect of the *general* statutes dealing with the public lands, and prescribing the modes by which private titles or interests therein may be acquired.

In *Hutton v. Frisbie*, a case which arose on the same facts, Chief Justice Sawyer, delivering the opinion of the court, said:<sup>2</sup> “Nor do we question the rule adopted in *Chotard v. Pope*<sup>3</sup> and *Lytle v. State*,<sup>4</sup> to the effect that when a party is authorized by an act of congress *generally* to enter ‘in any land-office,’ etc., ‘a quantity of land not exceeding,’ etc., he must be limited in his

<sup>1</sup> 58 Cal. 142.

<sup>3</sup> 12 Wheat. 587.

<sup>2</sup> 37 Cal. 475, 485, 486.

<sup>4</sup> 9 How. 333.

selection to lands subject to selection, and cannot take lands already sold, or reserved from sale, or upon which a pre-emption, or some other right, has attached under a law *which is still in force*, and which covers and protects it. The rule is obviously sound. It cannot for a moment be supposed that congress, by *such general acts*, contemplated that the party should be authorized to take land upon which other parties had already entered and taken steps to acquire it, and were diligently pursuing their rights under acts *still in force* with reference to that land, or that it intended in this *general way* to repeal such acts. The two acts in such cases are not necessarily inconsistent, and can be so construed in the mode adopted by the court as to stand together; and in such cases it is obviously the duty of the court so to construe them. But such is not the case with the act we are now considering." Again: "The policy of the pre-emption laws was undoubtedly beneficent. They were intended to give those who were pioneers in the unsettled wilds of the public domain the first right to purchase the unoccupied lands which they have had the courage and hardihood to settle, and it *will always be our pleasure as well as duty to extend to all such the utmost protection justified by the laws of the land*. But this beneficent policy has no element in harmony with the principle that impelled men to rush in upon the improved possessions, and avail themselves of the labor of their neighbors, under the condition of things connected with the Suscol rancho, [*i. e.*, the grant to A.] The equities which lay at the foundation of the pre-emption policy were, in this particular instance, not with those who entered upon the possessions of such of their neighbors as were honest purchasers; but they were all, and even equities of a much higher obligation, with the purchasers in good faith, who were not merely pioneers, but also parties who had paid for their lands, and long occupied and improved them, under the belief that they had a good title; and congress hastened to recognize

and give effect to those equities by passing the act in question.” Again, the same able judge says: “The difference between this case and those of *Chotard v. Pope* and *Lytle v. State*, where the parties were entitled to select lands from a much larger portion of the public domain, is so obvious that argument can scarcely make it appear more plain. Where an act authorizes a party to enter any thousand acres of land he may select within specified exterior boundaries containing one hundred thousand acres, or in a whole state, and it happens that the government has already sold a given tract within said boundaries, or a pre-emption right in favor of another party has already attached to said particular tract under some prior law, it is not for a moment to be supposed that it was intended to permit an entry of the tract of land so sold, *or upon which such prior right had already attached*. But if he is authorized in express terms to enter the very same specific tract, and no other, before sold or upon which the pre-emption right had attached, there can be no doubt as to the intent to allow the entry of that specific tract, whether it was in the power of congress to give effect to that intent or not. And that is just the difference between the cases cited and the one under consideration.” The opinion of Mr. Justice Clifford in *Frisbie v. Whitney*<sup>1</sup> contains explanatory and limiting language to the same general effect.

It would seem that language could not be more plain and pointed than that of the foregoing extracts, to show that the decisions in *Hutton v. Frisbie* and *Frisbie v. Whitney* were confined to the operation of special legislation dealing with specified portions of the public domain, and had no reference whatever to the effect of the *general* statutes of congress forming parts of the same general system, nor to the conflicting rights of priority between two parties claiming under the different and

*co-existing* provisions of these general statutes. The decision in the case of *Western Pac. R. R. v. Tevis*<sup>1</sup> was also based upon special legislation of exactly the same character.

Where A. duly locates and settles upon a surveyed tract of the public land bordering upon a stream, and files his declaratory statement in (say) 1874, duly completes the requirements of the statute and pays the price in 1877, and receives his patent from the government in 1879; and B. duly posts and serves the notices of his appropriation of the water of the same stream in 1875, and proceeds with reasonable diligence to construct his dams, ditches, and other necessary works, which are not completed, however, so that he can begin the *actual use* of the water until 1880,—the appropriation of water by B., it is held, relates back to the time of his preliminary act of posting and giving notice in 1875, so that he is legally in the same position as though his actual use of the water had begun at that time; while it is said that the right of A. as a patentee shall only relate back to the time when he had paid up, in 1877. And thus, although A.'s initial step was made before any act whatever done by B., and his legal title was perfected by patent before B.'s works were completed, and the actual use of the water began, yet A.'s rights as a riparian owner on the stream are said to be subsequent to those of B. to appropriate perhaps the entire waters of the stream. In my opinion, there is nothing in the decisions of the United States supreme court, nor in those of the California supreme court, prior to the case of *Farley v. Spring Valley M. & I. Co.*, which necessarily establishes or tends to establish for the pre-emptor, or other grantee of the United States, a rule so different from that which governs the appropriator of water; and there is nothing in the general statutes of congress, nor in the policy which underlies the system,

which requires such a discrimination between the two classes of claimants. The notices posted and given by the appropriator of water clearly do not confer on him any higher equity as a *bona fide* purchaser; since the actual and continuous possession required of the pre-emptor is a notice of his prior claim,—a notice of the very highest character. I have dwelt upon this particular topic at such length because the subject seemed to be one of practical importance; the discrimination against the pre-emptor or other private grantee of the United States seemed to be inequitable; the decisions bearing upon it are very few; and possibly the court may be called upon to re-examine the question in some subsequent case.

#### § 42. Later decisions establishing doctrine of relation.

[It does not appear that the supreme court of California has yet been called upon to reconsider its decision that the doctrine of relation cannot be applied to carry the rights of a pre-emptioner or homesteader back to the date of his original entry or settlement, as against an intervening appropriator of a water-course flowing through or along the land. And so far as regards the judicial doctrine of that particular state, the question must be regarded as standing in the same condition as when our learned author wrote the preceding sections. In the state of Washington, also, the courts, following the lead of the California tribunals, have held that the right to appropriate waters on the public domain continues until the United States has made primary disposal of the soil; that the government cannot be said to have disposed of land under the pre-emption laws until final proof and payment, and not under the homestead law until final proof of the homesteader which entitles him to a patent; and hence that the doctrine of relation cannot carry the rights of the pre-emptioner or homesteader back to the time

of his first filing or settlement, so as to cut out the rights of an intervening appropriator of the water.<sup>1</sup>

But these decisions can no longer be regarded as of force. For the supreme court of the United States has now fully and fairly decided the question, and in a directly contrary manner, and its judgment must of course be accepted as authoritative and conclusive. That court now holds that the filing of a homestead entry of a tract of land across which a stream of water runs in its natural channel, with no prior or existing right or claim of right to divert it therefrom, confers a right to have the stream continue to run in that channel without diversion; and this right, when completed by full compliance with the requirements of the statutes on the part of the settler, and the issue of a patent to him, *relates back* to the date of the filing, and cuts off intervening adverse claims to the water.<sup>2</sup> This decision has been followed and applied in Oregon.<sup>3</sup> And indeed, in that state, it had already been held, in accordance with what was stated to be the ruling of the United States land department, that a settlement made by a homestead claimant upon the public lands of the United States, and compliance with the act of congress on the subject, segregated the same from the public lands and cut off intervening claims.<sup>4</sup>

Although the decisions to which we have here referred are confined, on the particular facts, to the rights of claimants under the homestead law, there are even stronger reasons for applying the doctrine of relation to the rights of pre-emption claimants. That it is the policy and intention of the general government to assimilate the rights acquired under these two

<sup>1</sup> Tenem Ditch Co. v. Thorpe, 1 Wash. St. 566, 20 Pac. Rep. 588; Ellis v. Pomeroy Imp. Co., 1 Wash. St. 572, 21 Pac. Rep. 27.

<sup>2</sup> Sturr v. Beck, 133 U. S. 541, 10

Sup. Ct. Rep. 350, affirming s. c. 6 Dak. 71, 50 N. W. Rep. 486.

<sup>3</sup> Faull v. Cooke, 19 Oreg. 455, 26 Pac. Rep. 662.

<sup>4</sup> Larsen v. Navigation Co., 19 Oreg. 240, 23 Pac. Rep. 974.



systems of laws is fully demonstrated by the act of congress which provides that the right of a settler claiming under the homestead law "shall relate back to the date of settlement, the same as if he settled under the pre-emption laws."<sup>1</sup>]

### § 43. Riparian rights under Mexican grants.

What are the rights of a private riparian proprietor, who obtains his title by a grant from the Mexican government, guaranteed and protected by the treaty between the United States and Mexico, and finally confirmed to him in the proceedings authorized by congress for the purpose of carrying into effect the stipulations of that treaty? We see no reason why the riparian rights of such a riparian proprietor should differ in any respect from those held by any other riparian proprietor who derives his title immediately or mediately from the United States by patent or otherwise. All the doctrines and rules of the law which define and regulate the water rights of private riparian proprietors upon *innavigable* streams at least, even if not upon navigable streams, belong entirely and exclusively to the jurisdiction and domain of state legislation. Congress has no power to interfere directly or indirectly with matters of this kind; any attempt of congress to control them by legislation would be wholly nugatory. The stipulations of the treaty with Mexico simply referred to, operated upon, and protected the *titles* of those private proprietors who held tracts of land, within the territory ceded to the United States, under grants from the Mexican government. These stipulations say in substance that such actual and *bona fide* grantees shall continue to be owners of their respective tracts, although the territory has passed into the domain of the United States; and that their right of ownership shall be respected by the United States government.

<sup>1</sup> Act of March 14, 1880, c. 89, § 3; 21 U. S. St. at L. 141.

The legislation of congress, and the judicial proceedings instituted under it, were intended to carry into effect these treaty stipulations, and they operate solely upon the titles, by declaring, confirming, and establishing the private ownership of the grantees as derived from the Mexican government, the original sovereign proprietor. The treaty, and the legislation of congress which carries it into effect, are of course binding, not only upon the federal government, but also upon the governments of all the states which have been established within the ceded territory, and within whose boundaries the granted lands are situated. The treaty with Mexico, while thus securing to the private proprietors the *title* and *ownership* of the tracts of land which had been granted to them by Mexico, did not attempt to provide that this ownership should be governed and controlled by the rules of the Mexican law, nor by any other rules of law different from those which would govern and control all private ownership of land within the territorial jurisdiction of the United States, or within the jurisdiction of any particular states. Even if the treaty with Mexico had expressly stipulated, not only that the *titles* of private persons holding under Mexican grants should be protected and should continue to be valid and perfect, but also that the ownership of such lands, when situated on the banks of streams, should be governed and regulated by the rules of the Mexican law concerning water and other riparian rights, such a stipulation would be completely inoperative and void as soon as the territory embracing these granted lands was organized into a state; the whole subject-matter would belong exclusively to the jurisdiction of the state; the rules concerning riparian rights would fall exclusively within the domain of the state municipal law,—whether that law adopted the common-law doctrines, or promulgated other rules in the form of statutes.<sup>1</sup> It

<sup>1</sup>This principle, and the authorities which support it, are discussed by Sawyer, J., in *Woodruff v. North Bloomfield, etc., Co.*, 9

seems plain, therefore, that the riparian rights of a private proprietor holding by a Mexican grant duly confirmed are exactly the same, governed by the same rules, as those held and enjoyed by any other private riparian proprietor within the state. The *source* of his *title* can make no difference as to the rights of property which accompany and flow from his ownership. The question of priority between such a grantee and a person who has appropriated the waters of the stream before his grant was confirmed by the United States authorities, must depend, we apprehend, upon the legal effect given to the confirmation. Does the confirmation relate back to the date of the treaty, so that the grantee is regarded as deriving his title directly and holding it continuously from the Mexican government; or does the confirmation operate only from its own date, so that the grantee is regarded as deriving and holding his title immediately and directly from the United States, in pursuance of an executory agreement made with Mexico? This question we shall not examine.

#### § 44. Summary of conclusions.

The conclusions from the foregoing discussion may be briefly summed up as follows: While a natural stream or lake is situated on the public lands of the United States, within the limits of a state, a person may, under the customs and laws of a state, and the legislation of congress, acquire by prior appropriation the right to use the waters thereof for mining, agricultural, and other beneficial purposes, and to construct and maintain ditches and reservoirs over and upon the public land; which right, although merely possessory, is good against all other private per-

Sawy. 441, s. c. 18 Fed. Rep. 801. The same principle is discussed by Mr. Justice Field in delivering the opinion of the court in the case of

Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, s. c. 4 Sup. Ct. Rep. 663.

sons, and is made by statute good as against the United States and its subsequent grantees.

When such a right has been acquired in this manner by prior appropriation, subsequent grantees of tracts of the public domain bordering on the same stream or lake—pre-emptors, homestead settlers, and all other purchasers—take and hold their titles subject thereto, and the patents issued to them by the United States government must expressly except or reserve all such “existing rights” so acquired by other persons in pursuance of the customs and laws of the state. The right thus excepted or reserved in a patent must, of course, be an “existing right” already acquired by some other person. When a grantee of the United States obtains title to a tract of the public land bordering upon a stream, the waters of which have not hitherto been appropriated, his patent is not subject to any possible appropriation which may be subsequently made by another party.<sup>1</sup>

These rules, founded upon local customs and laws, and ratified by congressional legislation, are confined in their operation to the public domain of the United States.<sup>2</sup> If tracts of public land bordering on a stream, and situated within a state, have come into the private ownership of purchasers or grantees from the

<sup>1</sup> [When there is nothing in the record to show the contrary, it must be presumed that the lands through which the stream flowed were public lands, and had not passed into private ownership at the time of the appropriation. *Lytle Creek Water Co. v. Perdew*, (Cal.) 2 Pac. Rep. 732. Parties being in the actual possession and use of a water privilege have a good *prima facie* right to it; but, when other parties prove a prior possession and use, they overcome this *prima facie* case. *Humphreys v. McCall*, 9 Cal. 59.]

<sup>2</sup> See *Lobdell v. Simpson*, 2 Nev. 274; *Lobdell v. Hall*, 3 Nev. 507; *Ophir Silver M. Co. v. Carpenter*, 4 Nev. 534; *Robinson v. Imperial Silver M. Co.*, 5 Nev. 44; *Covington v. Becker*, Id. 281; *Hobart v. Ford*, 6 Nev. 77; *Vansickle v. Haines*, 7 Nev. 249; *Barnes v. Sabron*, 10 Nev. 217; *Shoemaker v. Hatch*, 13 Nev. 261; *Dick v. Caldwell*, 14 Nev. 167; *Strait v. Brown*, 16 Nev. 317; *Cramer v. Randall*, 2 Utah, 248; *Munro v. Ivie*, Id. 535; *Fabian v. Collins*, 3 Mont. 215; *Burkley v. Tieleke*, 2 Mont. 59; *Caruthers v. Pemberton*, 1 Mont. 111; and other cases previously cited.

United States before any appropriation has been made of the water, their rights as riparian proprietors must be determined and regulated wholly by the municipal law of the state concerning that subject-matter, over which congress has no power whatever to legislate.

Whenever a private person, as pre-emptor, homestead settler, or other purchaser or grantee, has acquired title from the United States to a tract of the public land bordering upon a stream or lake within a state, any subsequent appropriation of the waters thereof by another party is subject to his prior rights as a riparian proprietor, whatever those rights may be under the municipal law of the state; and, as against such subsequent appropriator, his rights as riparian proprietor are complete, at least from the time when he has duly performed all of the statutory requirements, including payment of the purchase price, if necessary, so as to entitle him to a patent, and not merely from the time of issuing a patent; even if his rights do not relate back to the initiative act of the continuous proceeding by which his title is finally perfected.

## CHAPTER IV.

### HOW AN APPROPRIATION IS EFFECTED.

- § 45. Successive appropriations.
- 46. Doctrines which control the appropriation.
- 47. The methods by which an appropriation is effected.
- 48. Intent to apply water to beneficial use.
- 49. There must be actual diversion.
- 50. There must be actual use of water.
- 51. Physical acts constituting appropriation.
- 52. Notice of intent to appropriate.
- 53. Reasonable diligence in completion of works.
- 54. When appropriation is complete.
- 55. Appropriation relates back to first step.
- 56. Effect of failure to comply with statutory rules.

#### § 45. Successive appropriations.

Having thus described the appropriation of waters from natural streams and lakes on the public domain of the United States, I shall proceed to consider the special doctrines which regulate such appropriation, and define the rights of appropriators. It may be stated as a general proposition, in this connection, that, when there have been several successive appropriations of water from the same stream, each appropriator stands in the position and has the rights of a *prior* appropriator towards all others whose rights have been acquired subsequently to his own. The term "prior appropriator" does not, therefore, always mean the person who is absolutely the first to obtain an exclusive right to the water of a particular stream.

#### § 46. Doctrines which control the appropriation.

The most important practical doctrines embraced under this head may be regarded as having been definitely settled by numerous decisions; and they are substantially the same in all the Pacific states and territories where this theory of a prior exclu-

sive appropriation of water prevails. The various topics to which these doctrines relate, and which require any discussion, are the following: The methods by which an appropriation is effected; the time from which the rights under an appropriation become vested; the property and other rights in general of the prior appropriator; the amount of water embraced in an appropriation, or the extent of the appropriation; subsequent appropriation, and the relations between successive appropriators of the same stream; abandonment of a prior appropriation. I purpose to treat of these matters in the order here given.

### § 47. The methods by which an appropriation is effected.

It should be carefully observed that the water right now under discussion may be, in its essential nature, merely a possessory right. Its acquisition and maintenance are not essential incidents of, and do not necessarily depend upon, a legal title to any portion of the public lands held by the appropriator under a patent or other conveyance from the government.<sup>1</sup> Nor is it necessary that the appropriator should have located or taken possession of any tract or parcel of the public domain bordering upon the stream or lake from which the appropriation is made. The tract or claim which he possesses, and on or at which the water is actually used, may be at a distance from such stream or

<sup>1</sup> ["One who locates upon public lands with a view of appropriating them to his own use becomes the absolute owner thereof as against every one but the government, and is entitled to all the privileges and incidents which appertain to the soil, subject to the single exception of rights antecedently acquired. He may admit that he is not the owner in fee, but his possession will be sufficient to protect

him as against trespassers. If he admits, however, that he is not the owner of the soil, and the fact is established that he acquired his rights subsequent to those of others, then, as both rest for their foundation upon appropriation, the subsequent locator must take subject to the rights of the former, and the rule, *qui prior est in tempore potior est in jure*, must apply." *Crandall v. Woods*, 8 Cal. 143.]

lake, and the very object of his appropriation may be to conduct the water from the stream, through a ditch or canal across the intervening *public* lands, to the tract which he possesses as a mining claim, a farm, or a mill; or even to sell and dispose of the water, thus conducted through the canal, to other parties, who use it for like purposes on their own "claims" or tracts of land. The true "riparian rights" belonging to "riparian proprietors," by virtue of their actual ownership of lands bordering upon a stream, will be considered hereafter; they are foreign to the present discussion.

#### § 48. Intent to apply water to beneficial use.

In order to make a valid appropriation of waters upon the public domain, and to obtain an exclusive right to the water thereby, the fundamental doctrine is well settled that the appropriation must be made with a *bona fide* present design or intention of applying the water to some immediate useful or beneficial purpose, or in present *bona fide* contemplation of a future application of it to such a purpose, by the parties thus appropriating or claiming. The purpose may be mining, milling, manufacturing, irrigating, agricultural, horticultural, domestic, or otherwise; but there must be some such actual, *positive*, beneficial purpose, existing at the time, or contemplated in the future, as the object for which the water is to be utilized; otherwise no prior and exclusive right to the water can be acquired, no matter how elaborate and complete may be the physical structures by which the attempted appropriation is effected.<sup>1</sup>

<sup>1</sup>Weaver v. Eureka Lake Co., 15 Cal. 271; Maeris v. Bicknell, 7 Cal. 261; Davis v. Gale, 32 Cal. 26; McKinney v. Smith, 21 Cal. 374; Ortmann v. Dixon, 13 Cal. 33; McDonald v. Bear River, etc., Co., Id. 220; McDonald v. Askew, 29 Cal. 200;

Gibson v. Puchta, 33 Cal. 310; Dick v. Caldwell, 14 Nev. 167; Dick v. Bird, Id. 161; Cramer v. Randall, 2 Utah, 248; Munro v. Ivie, Id. 535; Woolman v. Garringer, 1 Mont. 535; Simmons v. Winters, 21 Oreg. 35, 27 Pac. Rep. 7.



Under this rule, an appropriation for mere purposes of speculation is nugatory.<sup>1</sup> [But a canal company, diverting the waters of a natural stream to a beneficial use, becomes the proprietor thereof, and, as such, may sell and deliver it for irrigating purposes, and that right can be defeated only by a failure of application of the water to a beneficial use. *Wyatt v. Larimer & Weld Irrigation Co.*, 1 Colo. App. 480, 29 Pac. Rep. 906.] And a diversion of water solely for the object of drainage, without any *bona fide* intention of its present or future use for other beneficial purposes, does not constitute a valid appropriation.<sup>2</sup> Thus, in the first of the cases cited below, the grantors of the plaintiffs had constructed a ditch for the purpose of drainage alone, with no intention of appropriating the water to any other use, and the defendants had subsequently made a ditch leading from the same stream with the intent of using the water thus diverted for a beneficial object. The court held that the defendants, although later in time, had gained a priority of appropriation over the plaintiffs' grantors, and over all persons holding under them.

**§ 49. There must be actual diversion.**

Again, since no exclusive *property* is or can be acquired in the water while still remaining or flowing in its natural condition, distinct and separate from the property in the land over which it runs,<sup>3</sup> it follows, as a second indispensable requisite of the appropriation under consideration, that there must be an actual diversion of the water from its natural channel or bed, by means of a ditch, canal, reservoir, or other structure.<sup>4</sup> For this pur-

<sup>1</sup> *Weaver v. Eureka Lake Co.*, 15 Cal. 271.

<sup>2</sup> *Maeris v. Bicknell*, 7 Cal. 261; *McKinney v. Smith*, 21 Cal. 374;

*Thomas v. Guiraud*, 6 Colo. 530.

<sup>3</sup> *Parks Canal & M. Co. v. Hoyt*,

57 Cal. 44; *Kidd v. Laird*, 15 Cal. 162.

<sup>4</sup> *Dalton v. Bowker*, 8 Nev. 190; *Riverside Water Co. v. Gage*, 89 Cal. 410, 26 Pac. Rep. 889.

pose, however, a dry ravine or gulch may be used as a part of a ditch, with the same effect as though the structure were wholly artificial;<sup>1</sup> and a "flume" is in all legal respects the same as a ditch or canal.<sup>2</sup> Not only may the appropriator use another natural ravine as a part of his ditch for conducting the water which has been diverted; he may even use a lower portion of the same natural channel from which the water was taken, for a like purpose. If, after diverting and using the water, the appropriator returns it into its original natural channel, without any intent to "recapture" it, then, as will be shown hereafter, he abandons it. But after duly diverting the water at some point, he may turn it back into the natural channel of the stream at a lower point, with the design of using a certain portion of such channel as a ditch, and of "recapturing" the water, and may then divert the same quantity originally appropriated at a point still lower down the stream.<sup>3</sup>

### § 50. There must be actual use of water.

[One of the essential elements of a valid appropriation of water is the actual *application* of it to some useful industry. This must follow and consummate the intention. To acquire a right to water from the diversion thereof, one must, within a reasonable time, employ the same in the business for which the appropriation is made. What shall constitute such reasonable time is a question of fact, (as will appear more fully hereafter,) depending upon the circumstances connected with each partic-

<sup>1</sup>Hoffman v. Stone, 7 Cal. 46. [Where plaintiff built a ditch upon public and unoccupied land, which conducted water to a point in a canyon, where it disappeared under ground, coming to the surface again at the mouth of the canyon, *held*, that he was entitled to be protected as against defendant, who

dug other ditches cutting off the supply. Keeney v. Carillo, 2 N. M. 480.]

<sup>2</sup>Ellison v. Jackson Water Co., 12 Cal. 542.

<sup>3</sup>Richardson v. Kier, 37 Cal. 263. Butte Canal, etc., Co. v. Vaughn, 11 Cal. 143.

ular case.<sup>1</sup> It has recently been ruled by the supreme court of Idaho, (*Conant v. Jones*, 32 Pac. Rep. 250,) that appropriators of water for irrigation purposes, after conducting water to the point of intended use, have a reasonable time in which to apply it to the use intended. They may add to the acreage of cultivated land from year to year; and make application of water thereto for irrigation as their necessities demand, or as their abilities may permit, until they have put to a beneficial use the entire amount of water at first diverted by them; provided that that amount is needed for the reasonable irrigation of the land. But a priority of right to the use of the water of a natural stream for the purpose of irrigation cannot be acquired merely by diversion of the water, but there must also be an application of the same to the soil; and priorities of rights are not to be determined from the capacities of the ditches, even though promises are made to apply all the diverted water to the soil within a reasonable time.<sup>2</sup> And in accordance with this principle it is held that a complaint for an unlawful interference with plaintiff's water rights, which alleges priority of appropriation, but without alleging facts showing a diversion and an application to a beneficial use, states merely a legal conclusion and is demurrable.<sup>3</sup> And

<sup>1</sup> *Sieber v. Frink*, 7 Colo. 148, s. c. 2 Pac. Rep. 901. [In Colorado, the first appropriator of water from a natural stream for a beneficial purpose has a right to the extent of his appropriation, (subject only to the qualifications contained in the Colorado constitution,) paramount to the right acquired by a subsequent patentee of the land. This right is not dependent upon the *locus* of the application of the water to the beneficial use. Nothing in the statutes is susceptible of a

construction which would vary this rule. *Coffin v. Left-Hand Ditch Co.*, 6 Colo. 443; *Thomas v. Guiraud*, Id. 530.]

<sup>2</sup> *Fort Morgan Land Co. v. South Platte Ditch Co.*, (Colo.) 30 Pac. Rep. 1032; *Combs v. Agricultural Ditch Co.*, (Colo.) 28 Pac. Rep. 966.

<sup>3</sup> *Farmers' High Line Canal Co. v. Southworth*, 13 Colo. 111, 21 Pac. Rep. 1028. See, also, *Peregoy v. McKissick*, 79 Cal. 572, 21 Pac. Rep. 967.

it is also held that an *excessive* diversion of water cannot be regarded as a diversion of it to a beneficial use.<sup>1</sup>

### § 51. Physical acts constituting appropriation.

The fundamental doctrine is well settled that, in order to constitute a valid appropriation of the kind under consideration, two distinct elements are absolutely essential,—the intent to appropriate water from a particular stream, and physical acts by which this intent is carried into effect, without abandonment, until the appropriation is completed. Either without the other is insufficient. How this intent may be signified, and what physical acts may be sufficient to carry it into operation, must depend somewhat upon the natural condition and situation of the locality, and other circumstances of the case. "In appropriating unclaimed water on the public land, only such acts are necessary, and such evidence of the appropriation required, as the nature of the case and the face of the country will admit, and are under the circumstances and at the time practicable. For example, surveys, notices, blazing of trees, followed by actual work and labor, without abandonment, will in every case, where the work is completed, give title to the water against subsequent claimants."<sup>2</sup> It follows, therefore, that a notice alone of an intent to divert or to use the water of

<sup>1</sup>Combs v. Agricultural Ditch Co., (Colo.) 28 Pac. Rep. 966.

<sup>2</sup>Kimball v. Gearhart, 12 Cal. 27; Osgood v. El Dorado, etc., Co., 56 Cal. 571; Thompson v. Lee, 8 Cal. 275; Kelly v. Natoma W. Co., 6 Cal. 107; Weaver v. Eureka Lake Co., 15 Cal. 271; Davis v. Gale, 32 Cal. 26; Robinson v. Imperial Silver M. Co., 5 Nev. 44; Columbia M. Co. v. Holter, 1 Mont. 296. [The true test of appropriation is the successful application of the

water to the beneficial use; the *method* employed is immaterial. Thomas v. Guiraud, 6 Colo. 530. The erection of a dam across a natural water-course is an actual appropriation of the water at that point, but not below it, although the water flowing over the dam is brought back into the water-course by means of canals made by the owners of the dam. Kelly v. Natoma Water Co., 6 Cal. 105.]

a specified stream will not of itself constitute an appropriation thereof;<sup>1</sup> nor, on the other hand, will the mere act of commencing or digging a ditch, even with the intent to appropriate, be sufficient of itself to give an exclusive right to the water of a stream, without some notice or publication of the intent.<sup>2</sup> "Public land is appropriated by one character of act; water, by another. The digging of a ditch on public land is not an appropriation of land sufficient for a mill-site, nor is the mere appropriation of a mill-site an appropriation of water for purposes of milling."<sup>3</sup>

### § 52. Notice of intent to appropriate.

While a notice of the intent to appropriate is essential, the mode of giving it depends upon the circumstances of the case, the nature and situation of the stream, and of the adjacent country. The usual mode seems to be by posting written or printed notices on or near the margin of the stream or lake at the point where the diversion is to be made, and perhaps at other points along the projected line of the canal.<sup>4</sup> No particular form of notice is prescribed. All that is required is that its terms shall be sufficient to put a reasonably prudent man upon inquiry;<sup>5</sup> and to this end its language must be liberally construed.<sup>6</sup> If an appropriator, after duly posting a notice,

<sup>1</sup>Thompson v. Lee, 8 Cal. 275; Robinson v. Imperial Silver M. Co., 5 Nev. 44; Columbia M. Co. v. Holter, 1 Mont. 296.

<sup>2</sup>Kimball v. Gearhart, 12 Cal. 27.

<sup>3</sup>Robinson v. Imperial Silver M. Co., 5 Nev. 44.

<sup>4</sup>See Osgood v. El Dorado, etc., Co., 56 Cal. 571.

<sup>5</sup>Kimball v. Gearhart, 12 Cal. 27.

<sup>6</sup>Osgood v. El Dorado, etc., Co., 56 Cal. 571, 579. [In the case of Floyd v. Boulder Flume Co., 11

Mont. 435, 28 Pac. Rep. 450, it was held that a notice that plaintiffs have a legal right to the use of, and that they claim, 2500 inches of the waters of Boulder and Lowland creeks for irrigating and other purposes, and that the special purpose for which the "water is to be used and the place of intended use is the fluming of wood, milling, and other useful purposes," and that the water is diverted from these streams by means of a ditch

and while prosecuting his work with diligence, posts a second notice of appropriation of the same water, he does not thereby abandon his claim under the former notice.<sup>1</sup> After a notice of the intention to appropriate the water is given, the works by which the appropriation is to be effected must be actually commenced, and must then be prosecuted with reasonable diligence unto completion, in order to perfect the exclusive right to the use of the water which is obtained through a valid appropriation.<sup>2</sup>

### § 53. Reasonable diligence in completion of works.

Whether the work has been begun and prosecuted with due and reasonable diligence is a question of fact for the jury, and their verdict will, in general, be conclusive.<sup>3</sup> The due and reasonable diligence in constructing the works will depend mainly upon the physical circumstances of the locality, upon the nature and condition of the region through which the ditch runs, its accessibility, the length of the season in which work is practicable, the difficulty of procuring adequate supply of labor, the extent and magnitude of the works themselves, and the like, and not upon the personal circumstances—especially the pecuniary circumstances—of the parties themselves.<sup>4</sup> In *Ophir Silver M. Co. v. Carpenter* it was held that “diligence in the pros-

and flume which carry 2500 inches of water from the streams, and that the water was appropriated on a date specified, sufficiently shows by what means the waters of Boulder creek were appropriated, the quantity and purpose of such diversion, and the date of the appropriation thereof.]

<sup>1</sup> *Osgood v. El Dorado, etc., Co.*, 56 Cal. 571, 579.

<sup>2</sup> *Osgood v. El Dorado, etc., Co.*, 56 Cal. 571, 581; *Parke v. Kilham*, 8 Cal. 77; *Kimball v. Gearhart*, 12 Cal. 37; *Weaver v. Eureka Lake*

*Co.*, 15 Cal. 271; *Ophir Silver M. Co. v. Carpenter*, 4 Nev. 534; *Woolman v. Garringer*, 1 Mont. 535.

<sup>3</sup> *Osgood v. El Dorado, etc., Co.*, 56 Cal. 571, 581; *Weaver v. Eureka Lake Co.*, 15 Cal. 271.

<sup>4</sup> *Ophir Silver M. Co. v. Carpenter*, 4 Nev. 534; *Weaver v. Eureka Lake Co.*, 15 Cal. 271; *Parke v. Kilham*, 8 Cal. 77; *Kimball v. Gearhart*, 12 Cal. 27; *Osgood v. El Dorado, etc., Co.*, 56 Cal. 571. See, also, *Dyke v. Caldwell*, (Ariz.) 18 Pac. Rep. 276.

ecution of work, such as the appropriation of running water by constructing a ditch for its use, does not require unusual or extraordinary efforts, but only such constancy and steadiness of purpose or of labor as is usual with men engaged in like enterprises, who desire a speedy accomplishment of their designs,—such assiduity in its prosecution as will manifest a *bona fide* intention to complete it within a reasonable time. In the consideration whether reasonable diligence has been exercised in the construction of a ditch necessary to the appropriation of water, requiring the outlay of much capital and the labor of many men, the illness of the appropriator and his want of pecuniary means to prosecute the work, being matters *incident to the person and not to the enterprise*, are not such circumstances as will excuse great delay in the work.”<sup>1</sup> In *Kimball v. Gearhart* the court held: “On the question of due and reasonable diligence in constructing the works, the jury may take into consideration the circumstances surrounding the parties at the date of the appropriation, *such as* the nature and climate of the country, and the difficulty of procuring labor and materials. \* \* \* When parties begin the construction of a ditch, who have not at the time the pecuniary means to complete it in a reasonable time, and they project the work and claim the water with full knowledge of their own lack of means, they cannot rely on such want of means as an excuse for delay, or for not prosecuting the work to completion with due diligence.” In *Parke v. Kilham*, 8 Cal. 77, it was also held that “when A. stands by and sees B. constructing a ditch at great expense, for the purpose of appropriating certain water to his own use, and does not inform B.

<sup>1</sup>[In this case it was held that the doing of five or six days’ work during a period of sixteen months, and only three months’ labor during a period of two and a half years, in order to obtain an appro-

priation of running water, was *not* such diligence in prosecuting the work as would give the person doing it a superior right to the use of the water. *Ophir Silver M. Co. v. Carpenter*, 4 Nev. 534.]

of his own prior claim to such water, A. and his vendees are thereby estopped from afterwards setting up or asserting such claim, even though it was originally the prior one."

#### § 54. When appropriation is complete.

The appropriation does not become perfect and final until the works are completed, so that the actual use of the water has begun, or, at least, so that its actual use can be commenced. Although, as will be shown hereafter, if the works are constructed with due diligence, the appropriation relates back to the date of the initial step, during the process of their construction, in the interval between their commencement and their completion, the appropriator acquires no vested, exclusive right to the water of the stream, and can maintain no action against other persons for their use or diversion of the water.<sup>1</sup> Such right of action only arises when the works and the appropriation are completed; although, on the question of priority between the appropriator and other claimants, his appropriation then relates back to the time of his giving notice. In *Nevada Co., etc., Co. v. Kidd*<sup>2</sup> these conclusions were fully established: "A court of equity will not restrain the diversion of water until the plaintiff is in a condition to use it. While the plaintiff's dam and ditch are in the process of construction, but are not yet ready to actually appropriate or use the water, the use of the water by other persons causes no injury to the plaintiff, and gives to him no cause of action for relief, either equitable or legal. When a party claiming water is constructing a dam and ditch, until he is in a position to use the water, his right to it does not exist

<sup>1</sup> [One who has by appropriation the prior right to the waters of a stream, by actually commencing and prosecuting the construction of a ditch and flume, has certainly a right to the use of so much water

as is necessary to preserve the flume from injury during construction. *Weaver v. Conger*, 10 Cal. 233.]

<sup>2</sup> 37 Cal. 282.



in such a sense as to enable him to maintain an action against another person, either to recover the water itself, or to recover damages for its diversion." The scope and effect of this decision should not be misapprehended. The case arose from an attempted or inchoate appropriation of the water of a stream on the public domain,—an appropriation of the kind sanctioned by congress and now under consideration. Although the language in some portions of the opinion is quite general, yet it should, of course, be confined to and limited by the facts of the case before the court. The rule adopted by the court is plainly confined to appropriators of water on the public lands of the United States, under the customs and laws of the state as recognized by the congressional legislation; and it has no reference whatever to private owners who have obtained titles to lands on the banks of streams, nor to the "riparian rights" of such proprietors. The court clearly had no intention of holding that owners of lands bordering on a stream can maintain no action against other persons for an infringement of their "riparian rights," unless they have made an actual appropriation or use of the water by means of a completed dam, ditch, or other structure. Such a ruling would be in direct conflict with numerous *dicta* and decisions by the same court.

### § 55. Appropriation relates back to first step.

It has been shown that an appropriation does not become final and perfect until the works, by which the water is diverted so as to be actually used, are completed. When, however, the right has thus been perfected, the doctrine of *relation* may operate and determine the question of priority between the appropriator and other opposing claimants to the waters of the same stream. If a notice of the intention to appropriate was properly given, and the work of constructing the dam, ditch, reservoir, or other necessary instrumentalities of the diversion was

begun within a reasonable time, and was prosecuted with due and reasonable diligence until their completion, then the exclusive right thus acquired by the perfected appropriation will relate back at least to the time of commencing the work, even if not to the time of giving the notice. If, however, the work was not prosecuted to completion with due and reasonable diligence,—in other words, if there was unreasonable delay in its prosecution,—the right of appropriation accrues and dates only from the time when the works were finally completed, and the diversion of the water actually began.<sup>1</sup> Both branches of the rule are concisely and clearly stated in the case of *Ophir Silver M. Co. v. Carpenter*: “In the appropriation of running water for the purpose of acquiring a right thereto, if any work is necessary to be done to complete the appropriation, the law gives a reasonable time within which to do such work; and protects the rights during such time by relation to the time when *the first step was taken*. Where the work necessary to complete an appropriation of running water is not prosecuted with diligence, the right to the use of the water does not relate back to the time when the first step was taken to secure it, but dates from the time when the work is completed or the appropriation is fully perfected.”

<sup>1</sup>*Osgood v. El Dorado, etc., Co.*, 56 Cal. 571; *Maeris v. Bicknell*, 7 Cal. 261; *Parke v. Kilham*, 8 Cal. 77; *Kimball v. Gearhart*, 12 Cal. 27; *Ophir Silver M. Co. v. Carpenter*, 4 Nev. 534; *Woolman v. Garinger*, 1 Mont. 535; *Sieber v. Frink*, 7 Colo. 148, s. c. 2 Pac. Rep. 901; *Irwin v. Strait*, 18 Nev. 436, s. c. 4 Pac. Rep. 1215. Although the cases generally say that the right relates back to the time of *commencing the work*, there would seem to be no reason why the relation should not extend back to the time of giving the no-

tice. The notice is the essential, initial step in one entire continuous proceeding, and the due diligence must be used from the date of giving the notice. Is it possible that the rights of another claimant could intervene between the date of the first appropriator's notice and the time when his work is actually begun, no matter how short the interval? Yet this result must be *possible* if the right of appropriation relates back only to the time of actually beginning the work. The supreme court uses the language, “the first step was taken.”

What constitutes due diligence in constructing the works was discussed under the preceding head. This doctrine of relation is practically important in determining the priority of the appropriation as against subsequent appropriators and claimants of water from the same stream, and as against subsequent grantees or purchasers of lands on its banks.<sup>1</sup>

### § 56. Effect of failure to comply with statutory rules.

[In some of the states, the method of appropriating water on the public lands, and of securing the benefit of such appropriation, is regulated by a complete system of statutory rules. Compliance with such regulations is of course essential to the perfection of the appropriator's rights, and it is only by a due observance of them that he can acquire exclusive rights to the water such as will be recognized and protected by the courts. But still, as these statutes are commonly framed, the appropriator, even if he omits in some particulars to follow the course which the law lays down for him, may become invested with rights which cannot be annulled by the act of any mere intruder, but will only yield to the claim of a person who, by a strict compliance with the law on his own account, has put himself in a superior position. In California, for example, section 1415 of the Civil Code requires a person desiring to appropriate water to post a notice thereof, and section 1416

<sup>1</sup> [In *Irwin v. Strait*, 18 Nev. 436, s. c. 4 Pac. Rep. 1215, it is said: "In determining the question of the time when a right to water by appropriation commences, the law does not restrict the appropriator to the date of his use of the water; but, applying the doctrine of relation, fixes it as of the time when he begins the dam or ditch or flume,

or other appliance by means of which the appropriation is effected, provided the enterprise is prosecuted with reasonable diligence." This language would seem to exclude the theory that the doctrine of relation would carry the appropriation back to the time of giving notice.]

requires work to be commenced within sixty days after the notice is posted, and to be prosecuted diligently and uninterruptedly to completion. Section 1418 provides that "by a compliance with the above rules, the claimant's right to the use of the water relates back to the time the notice was posted." Section 1419 is as follows: "A failure to comply with such rules deprives the claimant of the right to the use of the water as against a subsequent claimant who complies therewith." In view of these provisions, the courts have decided that if a person makes an actual appropriation of the water, and diverts it to his land and applies it to a beneficial purpose, though without complying with the statutory rules, he acquires a right to its use as against any subsequent claimant who does not show a compliance on his part with the provisions of the Code.<sup>1</sup> In other words, a failure to give the required notice, or otherwise to follow the statutory direction, will not invalidate the rights of the appropriator *except* as against one who makes an appropriation on his own account and does comply with the statute in respect to the notice and the commencement and prosecution of his works. And this rule holds not only as between prior and subsequent appropriators of the water, but also as between an appropriator and a subsequent pre-emption claimant of the land through which the water flows. That is, the mere acquisition of title to such land will not of itself enable the owner to defeat a claim of prior appropriation which was informally or defectively made. But to accomplish this result the owner must himself proceed, formally and regularly, to make an appropriation of the water which he desires to claim.<sup>2</sup>

<sup>1</sup>De Necochea v. Curtis, 80 Cal. 198; Burrows v. Burrows, 82 Cal. 564, 23 Pac. Rep. 146.  
397, 20 Pac. Rep. 563, 22 Pac. Rep.

<sup>2</sup>De Necochea v. Curtis, *supra*.

A somewhat similar question arose in Montana, under the provisions of an act passed in 1885,<sup>1</sup> which enacted that persons who had theretofore acquired rights to use the water of any stream for irrigation should, within six months after the publication of the act, file, in the office of the recorder of the county in which the water right was situated, a declaration in writing stating the number of inches claimed, the purpose and place of intended use, the means of diversion, the date of appropriation, and the name of the appropriator, with a proviso that a failure to comply with these requirements should "in no wise work a forfeiture of such heretofore acquired rights, nor prevent any such claimant from establishing such rights in the courts." In a suit to enjoin the diversion of the water of a stream, where it was shown that the plaintiff actually appropriated the water in 1880 for irrigating his land, and had continuously used it for that purpose, it was held that his right was superior to that of defendant, whose appropriation was made in 1889, although it was not until 1891 that plaintiff recorded his notice of appropriation.<sup>2]</sup>

<sup>1</sup> Comp. St. Mont. § 1258.

<sup>2</sup> Salazar v. Smart, (Mont.) 30 Pac. Rep. 676.

## CHAPTER V.

### NATURE AND EXTENT OF THE RIGHT ACQUIRED BY APPROPRIATION.

#### I. NATURE OF THE RIGHT ACQUIRED.

- § 57. Appropriator's right begins at head of his ditch.
- 58. Nature and extent of right depends on purpose of appropriation.
- 59. Property in ditches and canals.
- 60. Sale of ditches and water rights.
- 61. Same; conveyance of water rights.
- 62. Water rights as appurtenant to land.
- 63. Tenancy in common.
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- 65. What are streams subject to appropriation.
- 66. Definition and characteristics of a water-course.
- 67. Percolating and subterraneous waters.
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- 73. Same; action for unlawful diversion.
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## I. NATURE OF THE RIGHT ACQUIRED.

**§ 57. Appropriator's right begins at head of his ditch.**

The doctrine is settled by repeated decisions that an appropriator who has constructed a ditch, and is thereby diverting the water of a stream, or any portion of it, for some beneficial purpose, obtains and has no property whatever in the water of such stream while it is flowing in its natural channel or bed, and before it reaches the "head" or commencement of the ditch where the diversion begins. It has even been questioned whether his right to the water after diversion, and while flowing through the ditch, is really a "property," or only an exclusive right of use; but it is settled beyond all question that he has no property in the water of a natural stream, flowing in its natural current and channel, before the diversion into his ditch or other structure takes place. He can maintain no actions based upon

such property. In fact, private property in the running waters of a natural stream, flowing in its natural channel, cannot be acquired, separate and distinct from a property in the land through and over which the stream runs.<sup>1</sup> In *Parks Canal & M. Co. v. Hoyt*<sup>2</sup> it was held that the water flowing in the stream above the head of the appropriator's ditch is realty, a part of the land, and does not become in any sense his property until it passes into his control in his ditch or other works. He cannot, therefore, maintain an action upon an implied contract, as for the price of personal property sold, against a person who has wrongfully diverted the water from the stream above the head of his ditch. His legal remedy for such an injury is by an action on the case to recover damages for the tort. In *Los Angeles v. Baldwin*,<sup>3</sup> although it appeared that the city had, by prescription or otherwise, acquired the right to appropriate and use the entire water of the Los Angeles river, yet it was held that the city did not own the *corpus* of the water while flowing in the river. In *Kidd v. Laird*<sup>4</sup> the general doctrine was laid down that running water, while flowing in its natural manner in the natural channel of a stream, cannot be made the subject of private ownership. A right may be acquired to the *use* of the water in such a condition, which will be protected as though it were a right of property; but this right is not a special property in the water itself,—in the *corpus* of the flowing water.

<sup>1</sup>*Lower Kings River W. Co. v. Kings River, etc., Co.*, 60 Cal. 408; *Parks Canal & M. Co. v. Hoyt*, 57 Cal. 44; *City of Los Angeles v. Baldwin*, 53 Cal. 469; *Nevada Co., etc., Co. v. Kidd*, 37 Cal. 282; *Mc-*

*Donald v. Askew*, 29 Cal. 200; *Kidd v. Laird*, 15 Cal. 161; *Ortman v. Dixon*, 13 Cal. 33.

<sup>2</sup>57 Cal. 44.

<sup>3</sup>53 Cal. 469.

<sup>4</sup>15 Cal. 161.



**§ 58. Nature and extent of right depends on purpose of appropriation.**

The nature and extent of the right acquired in the water after its diversion, while under the control of the appropriator, in his ditch, canal, reservoir, or other structure, must depend, I think, upon the purpose for which the appropriation is made. Where the appropriation is made for purposes of irrigation, or agriculture, or municipal uses, or mining, or for sale to others to be used by them in any of these modes, where the use wholly or largely *consists in the consumption*, it would seem that the appropriator acquired a higher right, a right more nearly equivalent to absolute property or ownership, than in cases where the appropriation is made simply for the purpose of milling, or of propelling machinery of any kind. In the latter case the use is not a consumption, and the water may be returned to its natural channel, after the use, without substantial diminution in quantity. Decisions concerning milling do not, therefore, in my opinion, furnish a necessary rule for other kinds and purposes of appropriation. In *Ortman v. Dixon*<sup>1</sup> the court said, concerning one who had appropriated water for a mill: "Whether A., by erecting a mill and dam, becomes entitled to the water *in specie*, or whether he is entitled to anything more than the use of the water as a motive power; whether there may not be an appropriation of the mere use, as well as an appropriation of the water itself, the *corpus* of the water, for sale,—are questions which need not be and are not now decided." In the later case of *McDonald v. Askew*<sup>2</sup> the court laid down a more definite rule on this particular matter: "One who locates on a stream, and appropriates the water for a mill or other machinery, does not obtain a *property* in the water as such, but only a right to the

<sup>1</sup>13 Cal. 33.

<sup>2</sup>29 Cal. 200.

momentum of its fall at that place, and to the flow of the water in its natural channel."

### § 59. Property in ditches and canals.

There is, of course, a plain distinction between the appropriator's right to the water which he diverts, and his right to the canal, ditch, reservoir, or other structure through which the water is conveyed. A ditch or canal itself, used for conveying the water to a mine or elsewhere, is not a mere easement or incorporeal hereditament; it is land.<sup>1</sup> If, therefore, a ditch runs from a stream to a mining "claim," and belongs to the owner of the mine, who uses a portion of its water in working his mining claim, it does not follow that the ditch is an appurtenance of the mining claim. And if the owner of a mining claim purchases a water ditch, "and the water rights thereto appertaining," this purchase does not of itself constitute the ditch and water rights appurtenances of the mining claim.<sup>2</sup>

### § 60. Sale of ditches and water rights.

The exclusive right to divert and use the water of a stream acquired by appropriation, as well as the ditch or other structure through which the diversion is effected, may be transferred and conveyed like other property or rights analogous to property. If a person having a possessory right to a parcel of land on a stream has erected a mill thereon, and has acquired a right to the water of the stream for his mill, a valid sale and conveyance of such real property transfers the water right also to the vendee.<sup>3</sup> While a ditch or other similar structure for appropriating and diverting water may be sold, the sale and conveyance must be by a written instrument,—a deed,—as in the case of other real estate. A mere verbal sale or transfer would be nu-

<sup>1</sup>Reed v. Spicer, 27 Cal. 61.

<sup>2</sup>Quirk v. Falk, 47 Cal. 453.

<sup>3</sup>McDonald v. Bear River, etc., Co., 13 Cal. 220.

gatory.<sup>1</sup> A person who enters into possession of such a ditch, under a mere verbal sale to himself, does not succeed to any rights of priority held by the vendor, so as to obtain the benefit of the vendor's prior appropriation; he must date his own appropriation, as against all other opposing claimants, from the time when he enters into possession.<sup>2</sup> [But the supreme court of Oregon, in a recent decision, without denying the doctrine laid down in *Smith v. O'Hara*, holds that where one holding a possessory right to public land appropriates water for the purpose of irrigating it, the *water right* becomes a part of the improvements, and may be sold verbally and transferred with the possessory right.<sup>3</sup> It is therefore necessary, as we understand this decision, to distinguish between a sale of a ditch or canal as a distinct article of corporeal property and a sale of the same ditch, as an improvement on land, and in connection with the possessory right to the land to which it belongs. In the latter case, the transfer of the ditch or the water right does not require any higher species of conveyance or assurance than that which will pass the vendor's interest in the land to which the ditch and water right are incidents. The Oregon court, in the case to which we refer, holds that when a settler appropriates water for the necessary irrigation of the land occupied by him, it becomes as much a part of his improvements as his buildings or fences, and can be sold and transferred with his possessory right in the same

<sup>1</sup>*Smith v. O'Hara*, 43 Cal. 371; *Loddell v. Hall*, 3 Nev. 507; *Burnham v. Freeman*, 11 Colo. 601, 19 Pac. Rep. 761. [A water right can be conveyed by a bill of sale not under seal. It certainly passes the equitable title, and that is sufficient, under our law, when fortified by possession. *Ortman v. Dixon*, 13 Cal. 33. A co-owner of

a water right, acquired by appropriation, can convey his own interest, but cannot convey so as to injuriously affect his co-tenant's right. *Henderson v. Nicholas*, 67 Cal. 152, s. c. 7 Pac. Rep. 412.]

<sup>2</sup>*Smith v. O'Hara*, 43 Cal. 371.

<sup>3</sup>*Hindman v. Rizor*, 21 Oreg. 112, 27 Pac. Rep. 13.

way. "The principal subject-matter of such a sale and purchase," says the learned court, "is the possessory right to the land, and the consequent preference over others in the purchase of such land from the government; and such a sale, followed by possession taken thereunder, vests the possessory right in the purchaser, except as against the government, and he succeeds to the rights of the settler to the possession of the land and improvements. The water-right being a necessary incident to the complete enjoyment of the land, the same principle which sustains a verbal sale of the possessory right to the land will also support a verbal sale of the water-right in connection therewith, so as to enable a purchaser to maintain a suit against a stranger for interfering with the same. The water, when appropriated and used for irrigation, becomes an incident to the land, and a transfer of the possessory rights thereto carries with it the water, unless expressly reserved. The general rule is that, where a party grants a thing as it is then used and enjoyed, he, by implication, grants all those easements which the grantor can convey which are necessary to the reasonable enjoyment of the granted property, and have been and are at the time of the grant used by the owner for the benefit of the granted premises; and, if the grantor wishes to reserve any right over the easement, he must reserve it expressly. Gould, Waters, § 354; *Cave v. Crafts*, 53 Cal. 135. This rule, we think, is as applicable to the transfer of possessory rights to public land as to any other species of property. . . . In fact, counsel for defendant did not claim that there was evidence indicating an intent to abandon, but he claimed that the verbal sale and transfer of this water-right operated, *ipso facto*, as an abandonment thereof, and in support of his position cited and relied on *Smith v. O'Hara*, 43 Cal. 371; *Pom. Rip. Rights*, § 89; *Gould, Waters*, § 234. The statements by

Pomeroy and Gould are based upon the doctrine announced in *Smith v. O'Hara*. In that case the plaintiff claimed as purchaser from the prior appropriator of a ditch used for conveying water for mining purposes, and undertook to prove the sale by oral testimony. The court held that a ditch, being an interest in real estate and lying in grant, could only be conveyed by deed, but that doctrine has no application to the case before us. In this case there was no attempt to convey the ditch separate from the possessory right to the land, but only as an incident thereto, and as part of the improvements thereon. It was an appurtenant to the principal thing sold, and passed as an incident thereto. We do not at this time undertake to question the doctrine that a ditch or canal itself, used for conveying the water to a mine or elsewhere, is an interest in land that can only be transferred and conveyed as in the case of other real estate, but we deny its applicability to the facts in this case.”]

In a recent decision by the supreme court of Nevada, this same rule was declared in the most general form: “Where, in a contest concerning priority, a party claiming a right to water by appropriation *fails to connect himself in interest* with those who first appropriated and used the waters of a stream, his own appropriation of the water must be treated as the inception of his right;” or, in other words, his right of appropriation must be dated from the time when he himself began to use the waters; he cannot link his own use onto that of the former occupants, and thus claim to be a successor to their prior rights. Their prior appropriation is virtually abandoned.<sup>1</sup>

<sup>1</sup>*Chiatovich v. Davis*, 17 Nev. 133, 28 Pac. Rep. 239.

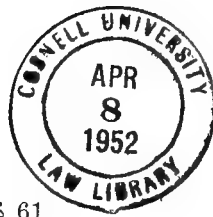
## § 61. Same; conveyance of water rights.

[The right of a riparian proprietor to the flow of a stream of water over his land may be severed from the land by grant, and where such right has been conveyed without reservation the grantor cannot maintain an action to enjoin a diversion of water from the stream.<sup>1</sup> It is also held—and this is more to our present purpose—that the right acquired by a prior appropriation, to use the water of a stream for irrigation, is not inseparably connected with the land for the benefit of which the appropriation was made, but the right may be sold separate and apart from the land; for instance, it may be sold to a city for the use of its inhabitants.<sup>2</sup> In the case cited, the court in Colorado derived this doctrine from the principle (now well settled by the judicial decisions in that and other states) that one who has acquired the right, by prior appropriation, to divert the waters of a stream may change the place of diversion and also the place of use, according to his necessity or interest, provided only that such change involves no injurious consequences to the rights of others.<sup>3</sup> And this rule, it was said, would dispose of the theory that the water was only appropriated for a particular tract of land, and that the appropriation would not hold for any other. And, as the court further observed, “no reason is perceived why, if the place of use may be changed to a tract adjoining the one in connection with which the priority came into existence, it may not as well be changed to a piece of land at a greater distance. The principle permitting the first change to be made being established, the exercise

<sup>1</sup> Gould v. Stafford, 91 Cal. 146, 27 Pac. Rep. 543.

<sup>2</sup> Strickler v. City of Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313.

<sup>3</sup> Citing Fuller v. Swan River Min. Co., 12 Colo. 12, 19 Pac. Rep. 836. And see, *infra*, § 65.



of the right cannot be made to depend upon the *locus* of the use, provided the rights of others are not injuriously affected by the change. The authority for changing the place of use from one part of a quarter section of land to another place upon the same quarter section will permit the purchase of land elsewhere, and utilizing the water in its cultivation." These principles being taken as established, it follows, as a logical necessity, that the right to the use of the water for irrigation is a right not so inseparably connected with the land that it may not be separated therefrom. The right has been treated and held as a property right in numerous cases.<sup>1</sup> "The authorities seem to concur in the conclusion that the priority to the use of water is a property right. To limit its transfer, as contended by appellee, would in many instances destroy much of its value. It may happen that the soil for which the original appropriation was made has been washed away and lost to the owner, as the result of a freshet or otherwise. To say, under such circumstances, that he could not sell the water right to be used upon other land would be to deprive him of all benefit from such right. We grant that the water itself is the property of the public. Its use, however, is subject to appropriation, and in this case it is conceded that the owner has the paramount right to such use. In our opinion this right may be transferred by sale so long as the rights of others, as in this case, are not injuriously affected thereby. If the priority to the use of water for agricultural purposes is a right of property, then the right to sell it is as essential and sacred as the right to possess and use. What difference can it make to others whether the owner of the priority in this case uses it upon his own land, or sells it to others to be used upon other

<sup>1</sup>The court here quotes from *on Waters*, § 234, and from § 58 of *Kidd v. Laird*, 15 Cal. 162, Gould this book.

lands? There is no claim of waste occurring between the present points of diversion and the place where the city is to take the water. Where a material waste results from the change, a new feature is introduced which need not be considered here. At common law water rights were declared to be the subject of sale, and although with us such rights are acquired by appropriation rather than by grant or prescription, as at common law, this certainly cannot affect the right of alienation.<sup>1</sup> . . . There is no controversy in the present case in reference to the mode and manner in which the right to the water may be conveyed, the contention extending further back; the claim being that the right cannot be conveyed at all, except with the land. The claim is not well founded. As we have seen, the right is the subject of property, and may be transferred accordingly; the sole limitation being that the rights of others shall not be injuriously affected by such transfer."

It has been held, however, that a person cannot claim rights in water under a contract with the prior appropriator and also as a riparian owner through subsequent purchases along the lower part of the stream.<sup>2</sup> And a grant of the right to divert the waters of a stream, made by a pre-emptor of public lands bordering thereon, is rendered worthless by the latter's abandonment of his claim before procuring a receiver's receipt for the land.<sup>3</sup>

A deed by the owners of a stream to a corporation organized for the purpose of diverting water from the stream for the purposes of irrigation, the furnishing of water for mining and manufacturing purposes, and for supplying

<sup>1</sup>Citing Angell, *Water-Courses*, c. 5; *Hurd v. Curtis*, 7 Metc. (Mass.) 94; *De Witt v. Harvey*, 4 Gray, 486.

<sup>2</sup>*Alhambra Addition Water Co.*

*v. Mayberry*, 88 Cal. 68, 25 Pac. Rep. 1101.

<sup>3</sup>*Conkling v. Pacific Imp. Co.*, 87 Cal. 296, 25 Pac. Rep. 399.



water to cities, conveying to the grantee and its successors and assigns the right "to divert and appropriate all the waters flowing in said stream," is a grant of the right to divert the water thereafter flowing in the stream, as against a subsequent purchaser from the grantor of land bordering on the stream.<sup>1]</sup>

### § 62. Water rights as appurtenant to land.

[It is an interesting question, whether a right to divert and use the waters of a stream, acquired by appropriation, is to be regarded as appurtenant to the land for the benefit of which the appropriation was made, so as to pass by a conveyance of the land without special mention or under the general designation of "appurtenances." In California, this question has of late years been settled in the affirmative, after a course of decisions tending more or less distinctly in that direction. In the case of *Coonradt v. Hill*,<sup>2</sup> which was an action to determine the title to a ditch and the right to divert through it the waters of a stream, the defendant alleged an estoppel on the part of the plaintiff by acts and declarations by means of which defendant was induced to purchase the land in the belief that the ditch was appurtenant thereto. And it was held that evidence of the convenience and necessity of the ditch to defendant's farm was admissible, as tending to show that the water right was appurtenant to the land and passed to defendant by a grant of the land. In a later case, it appeared that a land and water company had conveyed a tract of land through which ran a ditch, reserving the ditch and a strip of land ten feet wide on each side of it, and

<sup>1</sup> *Doyle v. San Diego Land Co.*, 46 Fed. Rep. 709. See, also, as further illustrating these principles, *San Diego Flume Co. v.*

*Chase*, 87 Cal. 561, 25 Pac. Rep. 756; *Dorris v. Sullivan*, 90 Cal. 279, 27 Pac. Rep. 216.

<sup>2</sup> 79 Cal. 587, 21 Pac. Rep. 1099.

also the right to enter on the lands for the purpose of making repairs, and to tunnel or in any manner develop the waters on the lands. The reservation provided that the grantees were not to use any of the water in the ditch, nor use any water on the land, except for the purpose of irrigation and for domestic use. It was held that the rights reserved were appurtenant to the ditch and water rights, and passed by grant from the company to a vendee, although the reservation contained no power of assignment or words of inheritance.<sup>1</sup> Finally, the attention of the court having been directed to the statutory provision in that state that "a thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or water-course, or of a passage for light, air, or heat from or across the land of another,"<sup>2</sup> it was held that where a land-owner appropriated water, and brought it on his land, and the land could not be advantageously used without the water, the fact that the license to convey the water over the premises of another was revocable did not prevent the water right from passing as appurtenant to the land.<sup>3</sup>

In the state of Colorado, on the other hand, the courts are by no means willing to accept the doctrine now settled in California. In a late case in the former state, in which this question arose, the plaintiffs claimed the right to certain water under an appropriation made by the persons from whom they took, as grantees, the land for which the appropriation was made. They claimed that by such appropriation the right to the use of the water became an incident of the land, and passed to them by the deeds of conveyance under the term "appurtenances." "At common

<sup>1</sup>Painter v. Pasadena Land Co.,  
91 Cal. 74, 27 Pac. Rep. 539.

<sup>3</sup>Crooker v. Benton, 93 Cal. 365,  
28 Pac. Rep. 953.

<sup>2</sup>Civil Code Cal. § 662.

law," said the court, "the riparian owner is vested with certain rights in the water of a natural stream flowing through his land, and such rights pass by a conveyance of the land to his grantee, unless specially reserved. It is seriously claimed that this familiar principle of the common law in reference to natural streams applies also to artificial streams designed for purposes of irrigation. Let us see what legal basis there is for such claim. Upon examination, we find few points of analogy and many points of difference between water rights at common law and water rights under the constitution of this state." Hereupon the court proceeded to indicate the essential particulars in which these differences were found to exist, and then proceeded as follows: "Where a party has constructed an irrigating ditch, and acquired the right to the use of water for the irrigation of his lands through such ditch, he may, undoubtedly, in connection with the sale and conveyance of the land, also sell and convey such water right without special words for that purpose inserted in the deed of conveyance. But how shall such water right be conveyed? Counsel for appellants insist that it passes to the grantee by virtue of the word 'appurtenances' in the ordinary deed, unless specially reserved. Certainly a ditch located on the land described in the conveyance would pass by an ordinary deed, not as an appurtenance, but as parcel of the land itself. But there is a manifest distinction between an irrigating ditch, as a mere artificial watercourse, and the right to the use of water from a natural stream to be carried through such ditch. In *Yunker v. Nichols*, 1 Colo. 551, it was held that the right to convey water over the land of another for purposes of irrigation may be conferred by verbal agreement, notwithstanding such right was, at common law, an interest in real estate, and so subject to the statute of frauds. In *Burnham v.*

Freeman, 11 Colo. 606, 19 Pac. Rep. 761, it is said of a private irrigating ditch belonging to individuals, and not to an incorporated company, that 'the law recognizes but two ways of acquiring, by purchase, an ownership interest in such a ditch. One is by deed or prescription, which presupposes a grant, and the other is by condemnation. An interest in such a ditch is an interest in realty. It cannot pass by a mere verbal sale.' These two cases may, perhaps, be reconciled or distinguished. It is claimed that the later case is decisive of the present controversy. But we do not rest the decision of this case upon the ground that the right to the use of water in this state for irrigation may not, under some circumstances, be acquired by parol, nor upon the ground that such right may not pass to the grantee of land, under certain circumstances, without special words in the deed conveying the land, or other deed for that purpose. In the present case it is clear that appellants have never acquired a valid title to the water rights in controversy. Not even a verbal agreement therefor is established by the evidence. Such water rights did not pass to appellants as an appurtenance to the land by virtue of their several deeds of conveyance. Even if such rights could, under some circumstances, be considered appurtenances to the land, the evidence in this case clearly shows that Frederick Baun, as the original owner, had severed such rights long before the inception of appellants' title."<sup>1</sup>

In Minnesota, it is held that a riparian owner may grant a part of his estate, not abutting on the stream, and as appurtenant thereto a right to draw water from the stream through his remaining land, and for any diversion of the

<sup>1</sup>Oppenlander v. Left Hand Ditch Co., (Colo.) 31 Pac. Rep. 854. But see, *per contra*, Coventon v. Seufert, See, also, Bloom v. West, (Colo.) (Oreg.) 32 Pac. Rep. 508.

natural flow of the stream disturbing such right the grantee may maintain an action.<sup>1]</sup>

### § 63. Tenancy in common.

Wherever ditches or other structures for diverting and appropriating water belong to two or more proprietors, such owners are, in the absence of special agreements to the contrary, tenants in common of the ditch, and of the water rights connected therewith, and their proprietary rights are governed by the rules of law regulating tenancy in common.<sup>2</sup> [But persons claiming rights in the waters of a stream, derived from the same original proprietors, are not necessarily tenants in common; and a convention *inter sese* of the owners as to the use of all the waters appropriated, by or under which the water is to be used for recurring periods of time by each, will not make them tenants in common.<sup>3</sup>

Of tenants in common, each has a right to enter upon and occupy the whole of the common property, and every part thereof, and may recover the whole thereof from a trespasser; and an arrangement as to periods for the use of the water, among the co-tenants, affects them only, and is for their convenience, and is no defense to an action of trespass against a third party by one of the co-tenants. In the case where this principle was laid down, Thornton, J., observed: "It is said that the waters were appropriated severally by those who did appropriate them. Concede this to be so, and we do not perceive that it makes any difference. If they are tenants in common of the water, such tenants and each of them are tenants seized *per my* and not *per tout*, and entitled to the possession of the whole. This must be so, because no one of them can cer-

<sup>1</sup> St. Anthony Falls Water-Power Co. v. City of Minneapolis, 41 Minn. 270, 43 N. W. Rep. 56.

<sup>2</sup> Bradley v. Harkness, 26 Cal. 69.

<sup>3</sup> Lytle Creek Water Co. v. Per-dew, 65 Cal. 447, 2 Pac. Rep. 732.

tainly state which part of them is his own. They hold by unity of possession, though their titles be distinct. If this unity is destroyed, the tenancy no longer exists.<sup>1</sup> \* \* \* Whether joint appropriators, holding the estate as joint tenants or tenants in common, the same is the result. Each can recover the whole, or take the necessary steps to protect the whole against the acts of a wrong-doer."<sup>2</sup>

Further, a court of equity has power to ascertain and determine the extent of the rights of property in water flowing in a natural water-course, acquired by persons who hold and are entitled to them, and to regulate, between or among them, the use in the flow of the water in such a way as to maintain equality of rights in the enjoyment of the common property.<sup>3</sup> Hence, where one of two or more co-owners, in the use of water of a stream appropriated by them for beneficial purposes, diverts for use a greater quantity of water than of right belongs to him, so as to materially diminish the quantity to which the others are entitled, such parties are entitled to enjoin the wrong-doer from diverting the water to their injury.<sup>4</sup> But it is held that water flowing in a ditch and owned by tenants in common cannot be mechanically *partitioned*. The only partition which a court can make, which will definitely and permanently end disputes of tenants in common in water used for mining purposes, is to order a sale and a distribution of the proceeds.<sup>5</sup> A tenancy in common in a water-ditch, arising under a deed, is not severed by claiming under a promise or parol license from a third person, where the deed and promise appear to be parts of the transaction.<sup>6</sup> A ten-

<sup>1</sup>Citing 2 Bl. Comm. 191, 192; *Carpentier v. Webster*, 27 Cal. 524.

<sup>2</sup>*Lytle Creek Water Co. v. Per-dew*, 65 Cal. 447, 4 Pac. Rep. 426.

<sup>3</sup>*Frey v. Lowden*, 70 Cal. 550, 11 Pac. Rep. 838.

<sup>4</sup>*Lorenz v. Jacobs*, (Cal.) 3 Pac.

Rep. 654; citing *Story*, Eq. Jur. § 927. See, also, *Combs v. Slayton*, 19 Oreg. 99, 26 Pac. Rep. 661.

<sup>5</sup>*McGillivray v. Evans*, 27 Cal. 92.

<sup>6</sup>*Campbell v. Shivers*, 1 Ariz. 161, 25 Pac. Rep. 540.

ant in common in certain water rights of a ditch for mining purposes, its use for mining having been abandoned and its flow turned into another stream, may recapture and use his proportion of the water for irrigation or other lawful purposes.<sup>1]</sup>

### § 64. Right to natural flow of water at head of ditch.

Although the appropriator has no property in the water of the stream flowing in its natural channel above his point of diversion, yet he acquires a most important *right* over or with respect to such water. This general right over the stream, of the party who has perfected a prior appropriation, is that the water of the stream should continue to flow in its usual manner, through the natural channel or bed of the stream, down to the head of his ditch, or to the point where his own actual dominion over it commences, to the extent or amount of his appropriation, without diversion or material interruption.<sup>2</sup> In a recent decision the court used the following language descriptive of this right: "The plaintiff's right to have the water flow in the river to the head of his ditch is an incorporeal hereditament appurtenant to his [artificial] water-course, [*i. e.*, his ditch.] Granting that the plaintiff does not own the *corpus* of the water until it shall enter his ditch, yet *the right to have it flow into the ditch* appertains to the ditch."<sup>3</sup> In another case a ditch conveying water for purpose of sale to miners, took its water from a stream near its head in the mountains, and thence ran for a

<sup>1</sup> Meagher v. Hardenbrook, 11 Mont. 385, 28 Pac. Rep. 451.

<sup>2</sup> Lower Kings River, etc., Co. v. Kings River, etc., Co., 60 Cal. 408; Parks Canal & M. Co. v. Hoyt, 57 Cal. 44; Reynolds v. Hosmer, 51 Cal. 205; McDonald v. Askew, 29

Cal. 200; Phoenix W. Co. v. Fletcher, 23 Cal. 481; Natoma W. & M. Co. v. McCoy, Id. 490; Kidd v. Laird, 15 Cal. 161; Barnes v. Sabron, 10 Nev. 217.

<sup>3</sup> Lower Kings River, etc., Co. v. Kings River, etc., Co., 60 Cal. 408.

distance of twenty-four miles, the water flowing through its entire length. The title to the upper half of the ditch was vested in A., and that of the lower half in B. A. was held to be entitled to the exclusive use of the water from the stream at the head of the ditch.<sup>1</sup> In *Phoenix Water Co. v. Fletcher*<sup>2</sup> it was held that the prior appropriator of a stream on the public lands, for mining purposes, has a right to have the water flow down the stream, above the point of his appropriation, without interruption or diminution in quantity.

### § 65. What are streams subject to appropriation.

The question here arises, what is a "stream" which may thus be appropriated? I do not purpose to enter into any full discussion of this question, which may be regarded as rather speculative than practical throughout these Pacific communities. It is sufficient to say that there must be an actual, natural stream, with defined banks, bed, channel, and current, as contradistinguished from a mere occasional torrent or flow of surface water from rains or melting snow, through a hollow or depression in the surface of the soil. The essential nature of a "stream" which can be appropriated was briefly but accurately described by the supreme court of Nevada in a leading case:<sup>3</sup> "To maintain the right to a water-course, it must be made to appear that the water *usually* flows therein in a certain direction, and by a regular channel with banks or sides. It need not be shown to flow continually, and it may at times be dry, but it must have a well-defined and substantial existence." It would plainly be impracticable to require, as an essential element of a "stream" in these Pacific states and territories, that the flow of water should be continuous, uninterrupted, and perennial, during the entire year, and from year to year. It is well known that some of

<sup>1</sup>*Reynolds v. Hosmer*, 51 Cal. 205.

<sup>2</sup>23 Cal. 491.

<sup>3</sup>*Barnes v. Sabron*, 10 Nev. 217.



the most important and well-defined streams in these regions become dry throughout the whole or a considerable portion of their lengths during certain seasons of each year. It is, perhaps, more correct to say that their waters sink beneath their beds, and flow beneath the surface instead of in their channels on the surface. All these streams, nevertheless, have well-defined beds, channels, banks, and currents, and are in every respect natural "streams."

### § 66. Definition and characteristics of a water-course.

[In order to constitute a water-course, there must be a defined channel, banks, and water usually flowing in a particular direction. It need not flow constantly; it may at times be dry; but the source, it is usually said, must be natural, certain, and definite, and not dependent upon the fluctuations of the seasons, as the falling of rain and the melting of snow.<sup>1</sup> But if the face of the country is such as necessarily to collect in one body so large a quantity of water, after heavy rains or melting of snows, as to require an outlet to some common reservoir, and if such water is regularly discharged through some well-defined channel, which the force of the water has made for itself, and which is the accustomed channel through which it flows and has flowed from time immemorial, such channel is a natural water-course.<sup>2</sup> The supreme court of Oregon, in a recent

<sup>1</sup> *Hanson v. McCue*, 42 Cal. 303; *Ely v. Ferguson*, 91 Cal. 187, 27 Pac. Rep. 587; *Geddis v. Parrish*, 1 Wash. St. 587, 21 Pac. Rep. 314; *Raymond v. Wimsette*, (Mont.) 31 Pac. Rep. 537; *Robinson v. Shanks*, 118 Ind. 125, 20 N. E. Rep. 713; *Case v. Hoffman*, (Wis.) 54 N. W. Rep. 793; *Dickinson v. Worcester*, 7 Allen, 19; *Shields v. Arndt*,

4 N. J. Eq. 234; *Gillett v. Johnson*, 30 Conn. 180; *Luther v. Winnisimmet Co.*, 9 Cush. 172; *Macomber v. Godfrey*, 108 Mass. 219; *Ashley v. Wolcott*, 11 Cush. 192; *Gannon v. Hargadon*, 10 Allen, 106; *Buffum v. Harris*, 5 R. I. 243.

<sup>2</sup> *Earl v. De Hart*, 12 N. J. Eq. 280; *Palmer v. Waddell*, 22 Kan. 352. See, also, *Union Pac. R. Co.*

case, upon a review of the authorities bearing on this question, remarks that "the conclusion to be deduced from these decisions is that a water-course is a stream of water usually flowing in a particular direction, with well-defined banks and channels, but that the water need not flow continuously,—the channel may sometimes be dry; that the term 'water-course' does not include water descending from the hills, down the hollows and ravines, without any definite channel, only in times of rain and melting snow; but that where water, owing to the hilly or mountainous configuration of the country, accumulates in large quantities from rain and melting snow, and at regular seasons descends through long deep gullies or ravines upon the lands below, and in its onward flow carves out a distinct and well-defined channel, which even to the casual glance bears the unmistakable impress of the frequent action of running water, and through which it has flowed from time immemorial, such a stream is to be considered a water-course, and to be governed by the same rules."<sup>1</sup>

Surface water, without a spring, when it has flowed in a certain direction for such a length of time as to have naturally formed a bed and banks and well-defined stream of flowing water, even though it may sometimes be dry at the place where it has formed such banks and bed, is still a water-course at that point.<sup>2</sup> A creek which has a natural channel three-fourths of

v. Dyche, 31 Kans. 120, 1 Pac. Rep. 243; Chicago, K. & W. R. Co. v. Morrow, 42 Kans. 339, 22 Pac. Rep. 413. Compare, however, Parks v. Newburyport, 10 Gray, 28.

<sup>1</sup>Simmons v. Winters, 21 Oreg. 35, 27 Pac. Rep. 7.

<sup>2</sup>Eulrich v. Richter, 41 Wis. 318; Kelly v. Dunning, 39 N. J. Eq. 482; Pyle v. Richards, 17 Neb. 180, s. c. 22 N. W. Rep. 370. See, also,

Lambert v. Alcorn, (Ill.) 33 N. E. Rep. 53. In the case of West v. Taylor, 16 Oreg. 165, 13 Pac. Rep. 665, it appeared that A. owned lands adjoining a lake, about two miles long and half a mile wide, fed by perennial springs and a mountain creek. Originally the main outlet from the lake was a second creek, into which the waters flowed at ordinary stages. From the west-

a mile long, with a bed of varying depth and width, through which surface-water is discharged into a stream, is a water-course; and the fact that it is dry most of the time does not deprive it of that character.<sup>1</sup> But a *ditch*, by means of which the waters of a natural stream are diverted, is not itself a water-course, though it is partly formed of ravines and gullies through which surface-water has occasionally flowed.<sup>2</sup>

In regard to the channel of the stream, it is required that it should have a distinct and substantial existence, with well-defined banks formed by the flow of the water, and presenting unmistakable evidence to the eye of the frequent action of running water.<sup>3</sup> Thus, sloughs or swales, hollows or ravines, by which water passes over land, are not, in the technical sense, water-courses.<sup>4</sup> Upon this point we find some instructive remarks in a recent decision of the supreme court of California. It was said by McKinstry, J.: "It is not essential to a water-course that the banks shall be unchangeable, or that there shall be everywhere a visible change in the angle of ascent marking the line between bed and banks. The law cannot fix the limits of variation in these and other particulars. As was said, in effect, by

ern part of the lake flowed a third creek, which emptied into a creek that flowed into the Pacific ocean. The main outlet becoming choked up with sand, the waters overflowed the lands of B. and C. on the north of the lake, forming marshes and swales, and escaped into a creek flowing into a bay; and for several years this was the main outlet from the lake. B. and C. erected a dike to protect their land, which raised the water in the lake, and threw it back upon A.'s land, overflowing about one thousand acres. Previous to erecting the dike, B. and C. had cut two ditches that carried the water off

their land. On this state of facts it was held that the waters on the lands of B. and C. could not be considered merely as surface water, but constituted a water-course, and that B. and C. had no right to erect the dike.

<sup>1</sup>Ferris v. Wellborn, 64 Miss. 29, 8 South. Rep. 165.

<sup>2</sup>Simmons v. Winters, 21 Oreg. 35, 27 Pac. Rep. 7.

<sup>3</sup>Gibbs v. Williams, 25 Kan. 214, s. c. 37 Amer. Rep. 241; Shively v. Hume, 10 Oreg. 76; Razzo v. Varni, 81 Cal. 289, 22 Pac. Rep. 848.

<sup>4</sup>Jones v. Wabash, etc., R. Co., 18 Mo. App. 251.

Curtis, J., in *Howard v. Ingersoll*, 13 How. 428, the bed and banks or the channel is in all cases a natural object, to be sought after, not merely by the application of any abstract rules, but, 'like other natural objects, to be sought for and found by the distinctive appearances it presents.' Whether, however, worn deep by the action of water, or following a natural depression without any marked erosion of soil or rock; whether distinguished by a difference of vegetation, or otherwise rendered perceptible,—a channel is necessary to the constitution of a water-course. Of course, we cannot judicially declare that a channel is of such a nature that it can never cease to exist. Both the evidence and findings herein show that, as a result of the action of water, channels have been closed and new channels formed. We cannot say but the indications of a channel may be removed by other natural forces. We can conceive that along the course of a stream there may be shallow places where the water spreads, and where there is no distinct ravine or gully. Two ascending surfaces may rise from the line of meeting very gradually for an indefinite distance on each side. In such case, if water flowed periodically at the lowest portion of the depression, it flowed in a channel, notwithstanding the fact that, the water being withdrawn, the 'distinctive appearances' that it had ever flowed there would soon disappear."<sup>1</sup> On the other hand, in a later case from the same court, it appeared that the owner of lands, upon which there was a lagoon having no natural outlet, cut a ditch for irrigating purposes. Thereafter he conveyed part of the land on which the lagoon was situated to the defendants, and the remainder of his lands to the plaintiffs. The irrigating ditch ran between the different tracts conveyed. By parol permission of their grantor, (the defendants,) the plaintiffs had used the waste waters of the ditch. On this state of

<sup>1</sup>*Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 770.

facts it was held that, the water never having flowed in any natural channel, the plaintiffs never acquired any riparian rights in the flow of water in the ditch.<sup>1</sup>

### § 67. Percolating and subterraneous waters.

[Percolating waters collected or gathered in a stream, running in a defined channel, are such property or incidents thereof as may be acquired by grant, express or implied, or by appropriation; and, when rights in them are thus acquired, the owner cannot be divested of his rights by the wrongful act of another.<sup>2</sup> Thus a lake, fed by streams and having a natural channel, and whose waters find exit by percolation in a perceptible current through a bed of gravel, is a running stream, and may not be obstructed so as to set back upon the lands of another.<sup>3</sup> The word "percolate," as used in the cases relating to the right of land-owners to use water on their premises, designates any flowage of sub-surface water other than that of a running stream, open, visible, and clearly to be traced.<sup>4</sup> But in California, where the Civil Code (§ 1410) provides that the right to the use of "running water flowing in a river or stream, or down a canon or ravine," may be acquired by appropriation, it is held that percolating water which seeps into a spring from a swamp, or wet land surrounding the same, is not subject to appropriation.<sup>5</sup>

In regard to subterranean streams, the general *consensus* of the authorities appears to be that, if an under-ground current of

<sup>1</sup>Green v. Carrotto, 72 Cal. 267, 13 Pac. Rep. 685. And see Gillett v. Johnson, 30 Conn. 180; Macomber v. Godfrey, 108 Mass. 219.

<sup>2</sup>Cross v. Kitts, 69 Cal. 217, s. c. 10 Pac. Rep. 409; Brown v. Ashley, 16 Nev. 317.

<sup>3</sup>Hebron Gravel Road Co. v.

Harvey, 90 Ind. 192, s. c. 46 Amer. Rep. 199.

<sup>4</sup>Mosier v. Caldwell, 7 Nev. 363. See a valuable editorial note on Percolating Waters in 64 Amer. Dec. 727.

<sup>5</sup>Southern Pac. R. Co. v. Du-four, 95 Cal. 615, 30 Pac. Rep. 783.

water flows in a known and well-defined channel, so as to constitute a regular and constant stream, the riparian owner may invoke the same rules, in insisting upon its uninterrupted flow, which exist in the case of water-courses upon the surface.<sup>1</sup> And so, where the exact course of water which has once emerged and sunk can be traced to where it emerges again, the proprietor at this point is protected in its use as if it were not a subterranean stream.<sup>2</sup> But if the water flows beneath the surface without a definite channel, or in courses which are unknown or unascertainable, it is not subject to the settled law governing the rights of riparian owners.<sup>3</sup>]

### § 68. Right to exclusive use of water.

Such being the appropriator's right over the *stream* as such, I proceed to consider his rights over the water which comes under his exclusive control by means of an actual diversion and appropriation. The general doctrine is settled, by the unanimous consent of the authorities, that the prior appropriator is entitled to the exclusive use of the water, up to the amount embraced in his appropriation, either for the original purpose or for any other or different purpose, provided the amount is not thereby increased, without diminution or material alteration in quantity or in quality; and his use will, to that extent and for such purposes, be protected against all subsequent appropriators or claimants using or interfering with the water, both above and

<sup>1</sup>Dickinson v. Grand Junction Canal Co., 7 Exch. 282; Chasemore v. Richards, 2 Hurl. & N. 186; Cole S. Min. Co. v. Virginia Water Co., 1 Sawy. 470; Hale v. McLea, 53 Cal. 578; Strait v. Brown, 16 Nev. 317; Mahan v. Brown, 13 Wend. 261; Smith v. Adams, 6 Paige, 435; Wheatley v. Baugh, 25 Pa. St. 528; Whetstone v. Bowser, 29 Pa. St.

59; Haldeman v. Bruckhart, 45 Pa. St. 514; Taylor v. Welch, 6 Or. 198.

<sup>2</sup>Saddler v. Lee, 66 Ga. 45, s. c. 42 Am. Rep. 62.

<sup>3</sup>Chasemore v. Richards, 7 H. L. Cas. 349; Dickinson v. Grand Junction Canal Co., 7 Exch. 282; Acton v. Blundell, 12 Mees. & W. Haldeman v. Bruckhart, 45 Pa. St. 514; Taylor v. Welch, 6 Or. 198.

below on the same stream; and to this end he may obtain all proper remedies, legal and equitable.<sup>1</sup> As illustrations, it is held in *Kimball v. Gearhart* that, when the appropriator has completed his ditch so as to receive the water appropriated, "he is then entitled to said water as against all persons subsequently claiming or locating it;" and "possession or actual appropriation is the test of priority in all claims to the use of water, when such claims are not dependent upon the ownership of the land through which the water flows." In *Ortman v. Dixon* it is held that "a prior appropriator of water for mill purposes is entitled to it to the extent of his appropriation, and for those purposes to the exclusion of any subsequent appropriation for the same or for other purposes." In *Barnes v. Sabron* the supreme court of Nevada held that "the first appropriator, for purposes of irrigation, of the water of a stream running through the public lands, has the right to insist that the water flowing therein shall, during the irrigating season, be subject to his reasonable use and enjoyment to the full extent of his original appropriation and beneficial use. To this extent his rights go, but no further; for, in subordination to such rights, subsequent appropriators may appropriate the remainder of the water running in said stream."

<sup>1</sup>*Himes v. Johnson*, 61 Cal. 259; *Stein Canal Co. v. Kern Island I. C. Co.*, 53 Cal. 563; *Reynolds v. Hosmer*, 51 Cal. 205; *Gregory v. Nelson*, 41 Cal. 278; *Clark v. Willett*, 35 Cal. 534; *Davis v. Gale*, 32 Cal. 26; *McDonald v. Askew*, 29 Cal. 200; *Hill v. Smith*, 27 Cal. 476; 32 Cal. 166; *Rupley v. Welch*, 23 Cal. 453; *Phoenix W. Co. v. Fletcher*, Id. 482; *Natoma W. Co. v. Mc-*

*Coy*, Id. 490; *Butte, etc., Co. v. Morgan*, 19 Cal. 609; *Kidd v. Laird*, 15 Cal. 161; *Kimball v. Gearhart*, 12 Cal. 27; *Ortman v. Dixon*, 13 Cal. 33; *Bear River, etc., Co. v. New York M. Co.*, 8 Cal. 327; *Ophir Silver M. Co. v. Carpenter*, 4 Nev. 534; *Barnes v. Sabron*, 10 Nev. 217; *Strait v. Brown*, 16 Nev. 317; *Atchison v. Peterson*, 20 Wall. 515.

**§ 69. Appropriator may change place or manner of use.**

Whenever a prior appropriation has been made for a certain kind of purpose or use, at a certain place, the appropriator may, as against other parties whose rights have accrued subsequently to his own, change the place of his use for the same purpose, if the amount of water taken by him is not thereby increased beyond that of his original appropriation; and it seems that he may, as against such parties, change the nature of the purpose or use to which the water was applied, provided the amount of water thereby taken is not increased, or the interference with or burden upon the subsequent claimants or appropriators is not augmented.<sup>1</sup> But such a change of place or of purpose is not permitted, as against parties who have acquired subsequent rights, when it would enlarge the amount of water used beyond that of the original appropriation, or otherwise increase the burden imposed upon them by such appropriation. These conclusions seem to be established by the decisions. In *Woolman v. Garringer*<sup>2</sup> it was held that a prior appropriator for mining pur-

<sup>1</sup>[*Fuller v. Swan Riv. Min. Co.*, 12 Colo. 12, 19 Pac. Rep. 836; *Greer v. Heiser*, 16 Colo. 306, 26 Pac. Rep. 770; *Ramelli v. Irish*, (Cal.) 31 Pac. Rep. 41. A riparian owner, having the right to divert a certain quantity of water from a stream, may take the same at any point on the stream, and may change the point of diversion at pleasure, provided he does not injuriously affect the right of other appropriators by such change. *Junkans v. Bergin*, 67 Cal. 267, s. c. 7 Pac. Rep. 684. An appropriator may, as against a subsequent purchaser from the United States, carry his ditch through such purchaser's lands to a point higher up

the stream, where such a change is rendered necessary to enable him to obtain the supply he is entitled to. *Ware v. Walker*, 70 Cal. 591, 12 Pac. Rep. 475. And see *Sieber v. Frink*, 7 Colo. 148, s. c. 2 Pac. Rep. 901. This is also the doctrine of the common law. In *Whittier v. Cochecho Manuf'g Co.*, 9 N. H. 454, it is stated that, where a right exists to use a certain quantity of water for propelling machinery, a change may be made in the mode and objects of the use, and in the place of using it, if the quantity is not increased, and the change is not to the prejudice of others.]

<sup>2</sup>1 Mont. 535.



poses, at a certain place, may extend his ditch, and use his water, to the extent of his original appropriation, at any other place, for the same or *for other purposes*. Such an appropriator, who has duly constructed his dam and ditch, need not give an actual notice to subsequent appropriators of his intention to extend his ditch, and reclaim his waste water, and use the water at another place. In *Maeris v. Bicknell*<sup>1</sup> the rule was stated that a mere change of the use from one mining place to another, where the appropriation was for mining purposes, does not forfeit nor abandon nor affect the prior right of the appropriator. In *McDonald v. Bear River, etc., Co.*,<sup>2</sup> after declaring that the appropriation of water for mill purposes stands on the same footing as an appropriation for mining, the court said that when a party has erected a saw-mill, and appropriated the water of a public stream for it, he may use the water for a grist-mill which he subsequently erects. In *Kidd v. Laird*<sup>3</sup> the doctrine on this subject was announced in the following broad and general manner: "A person entitled to divert a given quantity of the water of a stream may take the water at any point of the stream, and may change the point of diversion at pleasure, if the rights of others are not injured by such change. This right of change does not depend upon the mode of acquiring the right to use the water, whether by express grant or by prescription, or whether by parol license or presumed consent of the proprietor. The difference as to the origin of the right affects the mode of determining its existence and its extent, [*i. e.*, the amount of water appropriated,] *and not the manner of its exercise and enjoyment.*" The proper limitation upon this doctrine was stated in the subsequent case of *Butte T. & M. Co. v. Morgan*,<sup>4</sup> which held that a party appropriating and diverting water at a certain point cannot afterwards change the place of diversion so as to preju-

<sup>1</sup> 7 Cal. 261.<sup>3</sup> 15 Cal. 161.<sup>2</sup> 13 Cal. 220.<sup>4</sup> 19 Cal. 609.

dice another person whose rights have subsequently accrued. And it was further said that the case of *Kidd v. Laird* does not hold anything conflicting with this conclusion, and the decision in that case, as there explained and limited, was reaffirmed. In *Davis v. Gale*<sup>1</sup> the court again laid down the general rule in the most unequivocal manner: "A person who has appropriated the water of a stream, and caused it to flow to a particular place by a ditch, for a special use, may afterwards change the use, and the place at which he used it, without losing his priority as against one who dug a ditch from the same stream before the change was made. Such a person, appropriating water for the working of a particular mine, may, after he has worked out and abandoned said mine, extend the ditch, and use the water at other points, without losing his priority as against a person who acquired rights in the stream subsequently to his appropriation. Appropriation and use of water for beneficial purposes are the tests of right in such cases, and not the place and *character of the particular use.*" In *Nevada W. Co. v. Powell*<sup>2</sup> the negative side of the rule was again applied, and the court said: "If a person has appropriated a *portion* of the water of a stream, and has made a dam and ditch amply sufficient to render his appropriation available, and has thereby acquired the right to use said portion only of such water, and in said manner only, this will not prevent other persons from acquiring a right to the *surplus* water of the stream, or to its bed or banks, or to the adjacent land, to any extent which will not interfere with the right previously acquired. When rights of subsequent appropriators once attach, the prior appropriator cannot encroach on them by extending his use beyond the first appropri-

<sup>1</sup>32 Cal. 26.

<sup>2</sup>34 Cal. 109. The facts of this case, however, to which the decision applies, show an increase in

the quantity of water used,—in the extent of the appropriation,—rather than a change in the place or in the kind of the use.

ation. In such a case the first appropriator cannot extend his claims, or change the manner of his appropriation, to the injury of the second appropriator, any more than the second can do so to the injury of the first; each is, in respect to his own appropriation, prior in time and exclusive in right." On this ground, it was held that the prior appropriator was not authorized, by raising the height of his dam, to cut off or diminish the flow of the *surplus* water which had been thus appropriated by the defendants.

[A very important qualification of the foregoing rule is developed in a recent decision of the United States circuit court in the district of Idaho. By the law of that state the appropriator of water is required to post a written notice, stating the amount of water claimed and the purpose and place of intended use. It is also provided that he may change the place of diversion, if others are not injured thereby. In the case at bar it appeared that defendant had appropriated water, to be used at a specified place for the purpose of operating machinery and other works, and after so using it he returned it to its natural channel substantially undiminished in volume. It was held that he could not change the place of use and reappropriate the water, to the damage of one who appropriated it lower down on the stream, after it was returned to its original channel. In the course of its opinion the court observed: "The use for which the water is appropriated and to which it is applied is an important factor in the construction of the statute. The controlling question, in any case, is whether subsequent locators have had such notice of prior rights, and their extent and effect, as would guard them against making invalid locations. In illustration, suppose some certain amount of water is appropriated to be used as a power by its conversion into steam, or, by combination with other elements, is to be converted into articles of mer-

chandise, or to be used upon some certain tract of land for the purpose of irrigation. Should the appropriator be precluded from thereafter changing either or both,—its use or the place thereof? The reply must be in the negative, for in all such cases the purpose of the appropriation is such that no subsequent appropriator can thereby be misled to his injury. Distinct notice is given in such cases, not only that so much water is drawn from the public supply, but that its appropriation is such that it cannot be used a second time. It is a notice that so much water is practically destroyed,—is eliminated from existence as water. A subsequent locator has actual notice that this amount of water is withdrawn from all public claim, is absorbed, and has become a vested right. He cannot base any claim upon it, or upon any expectation that, some time in the future, it will become the subject of appropriation. Should such prior right be subsequently forfeited, he gains nothing thereby, as his rights are measured alone by what he could, and actually did, claim at the time of his appropriation. Neither does he lose anything, nor is he in any way damaged, should the first appropriator change his use, or the place thereof, for, in either event, he still has left all he ever claimed, or was entitled to claim. The appropriation of water for placer mining purposes, at some specified place, involves a somewhat similar principle. It is such an actual appropriation of a definite amount, and for such purpose, as, in the nature of things, must operate as a notice to all that its place of use must, from time to time, as the ground is worked, be changed. Should one use the water as it passes from the works of the prior claimant, he must do so at his own risk, and he cannot complain that changes are made which he had full notice would likely occur. In this action, however, the facts are quite different. In 1886 the defendant located the water, specifying

that it was to be used at its mill for the purpose of power in operating machinery and in concentrating ores, and in pursuance of such notice conducted it to such mill, and, after there so using, returned it to the original channel of the stream from which it had been taken, and practically undiminished in quantity or deteriorated or changed in quality. The use made of it was purely usufructuary, and in no sense partaking of the nature of ownership in the water. The defendant, by its declarations and acts, in effect said to the world that the only use it had for the water was at the place and in the manner specified, and that, when so used, it had no further claim upon and abandoned it. Under such circumstances, there was neither direct nor implied notice that it would be used elsewhere or for other purposes by defendant. On the contrary, the public was justified in believing that defendant had made the only use thereof intended; that the same would continue; and that in the future it would be returned to the creek as it had been. Would it not follow, from such facts, that plaintiff, in claiming the water after its return to the creek, was fully justified? If justified in such claim, then protection thereof must follow. If the defendant's position is sustained by the law, it would follow that the prior appropriator would, in all cases, so absolutely control the water, to the extent of such appropriation, that no other person could thereafter attempt any permanent use of it, except at great risk of loss, even when such use would not damage the first appropriator. Suppose, in this case, the stream below defendant's mill were lined with ore-mills, all operated by the same water, as it passed from the wheels of one mill to the next below, and all by appropriations subsequent to defendant. Upon defendant's theory, all such mills may be closed, and utterly destroyed, whenever the latter con-

cludes to modify its plans, and divert the water elsewhere."<sup>1</sup>]

### § 70. Remedies for interference with these rights.

Such being the rights of the appropriator, any interference with the water of the stream itself, either above or below the point of his diversion, which hinders the full enjoyment of those rights, and any interference with the water while in the ditch, dam, or reservoir, or with these structures themselves, are injuries, for which suitable remedies may be obtained.

### § 71. Injuries to ditches.

A ditch may be injured, or even destroyed, by mining under it, thereby causing the surface of the soil over which the ditch runs to crack and settle. In such a case the mine-owners are liable to the proprietor of the ditch when the injury has been caused by their negligent or unskillful manner of conducting their mining operations; but whether they are liable for such an injury in the absence of all negligence and unskillfulness is more than doubtful.<sup>2</sup> In the case cited, which was brought to restrain the mining operations under such circumstances, the court say that the plaintiff has a right to a ditch on the surface of the soil, and the defendants have a right to mine under the surface. These rights are not *necessarily* incompatible or conflicting. To the two parties so situated the maxim, *qui prior est in tempore potior est in jure*, does not apply, but rather the maxim, *sic utere tuo ut alienum non lædas*. How far a court of equity will relieve against such an injury, when no negligence or lack of skill is charged, the court expressly refrain from deciding, and suggest the following query: "Whether ditch property in the mining regions, although conceded to be real estate,

<sup>1</sup> Last Chance Min. Co. v. Bunker Hill & S. Min. Co., 49 Fed. Rep. 430.

<sup>2</sup> Clark v. Willett, 35 Cal. 534.

is to be regarded by courts of equity with the same measure of favor as that which is extended to land held by owners for its own sake, and not put to use for an ulterior object, is doubted, but not decided." It is abundantly settled that parties engaged in mining operations will be restrained from interfering with, or destroying or washing away, the ditch belonging to another person. The rights of a prior ditch-owner, as against persons engaged in mining, were fully established by the case of *Gregory v. Nelson*,<sup>1</sup> in which the following points were decided: If the complaint avers ownership by the plaintiff of a certain ditch, and that the ground over which it runs was vacant and unoccupied when it was dug, and the plaintiff has used it for years for mining purposes, and the answer does not deny these allegations, nor set up any prior right of defendants to said ground, nor any claim or right of defendants to destroy the ditch, the court should enjoin the defendants from destroying or interfering with the ditch upon the pleadings, regardless of the testimony. If a party owns a ditch, and the right of way for the same, to conduct water for mining purposes, and has acquired such right by prior appropriation, the court, in an action brought to restrain the defendants from washing away the ground, should not allow the defendants to wash away the ditch, provided they build a flume or other aqueduct in place of the ditch of sufficient capacity to carry the water flowing through it. A court of equity had no power to make such a decree under these circumstances. A court should not license a trespass to ditch property in the mining regions, nor compel the owner to exchange his ditch for some other means of conveying the water flowing therein.

<sup>1</sup>41 Cal. 278.

**§ 72. Remedies for unlawful diversion.**

Interference with the water to which the appropriator is entitled, whether flowing in the stream or running through his ditch, may either diminish its *quantity* or deteriorate its *quality*. These two kinds of injuries will be considered separately.

Of course the mere use of the water by another person, when its quantity is not thereby lessened nor its quality deteriorated, is no injury to a prior appropriator. If, therefore, A. owns a ditch, and has the right to divert the water of a certain stream by its means, and B. subsequently takes water from the same stream at a place above the head of A.'s ditch, and uses it for his own purposes, but returns it back undeteriorated in quality into the stream before it would reach A.'s ditch, or even into the upper part of the ditch itself at a point before A. has use for it, no injury is thereby done to A., and he has no cause of action against B. therefor.<sup>1</sup> [And unless the prior appropriator is entitled to all the water of the stream, he cannot, in the nature of things, identify certain specific water as belonging to himself while the same remains in the natural channel, and so long as he is able to secure the full amount of water to which he is entitled, he will not be heard to complain that others are diverting its waters.<sup>2</sup> At common law, it is the right of the riparian proprietor to have the whole volume of the stream flow in its natural channel by or through his land. And if those above him divert or consume the stream or any portion of it, (except for necessary and reasonable riparian uses,) he may have his action against them. Hence in such an action, it is not a proper or admissible defense that the plaintiff, notwithstanding the acts complained of, has enough water left for his uses and purposes, or would have enough if he properly

<sup>1</sup>Yankee Jim's Union W. Co. v. Crary, 25 Cal. 504.

<sup>2</sup>Saint v. Guerrerio, (Colo.) 30 Pac. Rep. 335.



controlled or secured it.<sup>1</sup> But under the peculiar doctrine of appropriation, where the amount of water to which the claimant is entitled depends upon the amount actually diverted and actually put into use by him, it is conceived that this rule would not be applicable.] Whenever the rights of a prior appropriator exist, they are equally protected from interference and consequent injury by parties subsequently locating on the stream or using its water either above or below him.<sup>2</sup> The diversion of the water of a stream is a private nuisance to the prior appropriator who is injured thereby, and he can maintain an action for such nuisance. For a past diversion the only remedy is a recovery of damages; but, when the diversion is continuing, equity will interfere by injunction.<sup>3</sup> It seems the injured party may himself abate the nuisance. When A. attempts to erect a dam for the purpose of diverting the water of a stream at a certain place, and such diversion is unlawful as against B., who is a prior appropriator and has a dam at a lower point on the stream, it is held that B. may oust A. from possession, and may prevent the construction of his dam.<sup>4</sup> Where a party has located on a stream, erected a mill, and appropriated the water

<sup>1</sup>Gilzinger v. Saugerties Water Co., 21 N. Y. Supp. 121; Miller v. Windsor Water Co., (Pa.) 23 Atl. Rep. 1132.

<sup>2</sup>Hill v. King, 8 Cal. 337.

<sup>3</sup>Tuolumne W. Co. v. Chapman, 8 Cal. 392; Parke v. Kilham, Id. 77. In *Brown v. Ashley*, 16 Nev. 312, the court held that where the act complained of is committed under a claim of right, which, if allowed to continue for a certain length of time, would ripen into an adverse right, and deprive the plaintiff of his property, he is not only entitled to an action for the vindication of

his right, but also for its preservation. In actions, therefore, for the diversion of water, where there is a clear violation of an established right, and a threatened continuance of such violation, it is not necessary for the plaintiff to show actual damages, or even a *present* use of the water, in order to authorize a court to issue an injunction restraining the actual or threatened diversion, and to make it perpetual.

<sup>4</sup>Butte T. M. Co. v. Morgan, 19 Cal. 609.

for its use, in an action against a mere trespasser to recover damages for diverting the water, it is sufficient that the complaint alleges the plaintiff's *possession* of the land, the mill-site, and the mill, without averring riparian *ownership* or a prior appropriation of the water.<sup>1</sup> In a suit to obtain relief against an injury to the plaintiff's rights as a prior appropriator, it is no defense whatever that the defendant's works are the more valuable, or his interests the more important.<sup>2</sup> Where an appropriation has been made at a particular point, a person subsequently locating or constructing works on the same stream above must not impede the regular flow of the water, if the prior appropriator would be injured thereby. A mere trivial or temporary irregularity caused in the flow does not constitute a cause of action; but a sensible injury will be restrained by injunction, as well as compensated for in damages.<sup>3</sup> Where a ditch-owner uses a ravine as a part of his ditch to conduct the water of a stream which he has appropriated, the natural waters of such ravine belong to him as the first appropriator thereof, and an action will lie in his favor for an appropriation or diversion of such waters by a third person.<sup>4</sup>

### § 73. Same; action for unlawful diversion.

[In order to be entitled to maintain an action for damages for the unlawful diversion of a water-course, or a bill in equity to restrain the continued or threatened diversion thereof, it is not necessary that the plaintiff should be the absolute owner of the land which is injured by the illegal

<sup>1</sup> McDonald v. Bear River, etc., Co., 13 Cal. 220.

<sup>2</sup> Weaver v. Eureka Lake Co., 15 Cal. 271.

<sup>3</sup> Phoenix W. Co. v. Fletcher, 23 Cal. 481; Natoma W. & M. Co. v. McCoy, 23 Cal. 490. In Carron v. Wood, 10 Mont. 500, 26 Pac. Rep. 388, it was held that defendants

were liable for actual injury to plaintiff by their diversion of the water previously appropriated by him, though they might not have used the water continuously, and though they might have used it only for a short time.

<sup>4</sup> Hoffman v. Stone, 7 Cal. 46.

acts of the defendant. Possession of land under a lease for years, for example, is sufficient to enable the tenant to bring such an action, or to maintain a bill for a perpetual injunction to restrain the diversion of water which is necessary to the enjoyment of the land, though, in the latter case, the injunction would necessarily end with the estate.<sup>1</sup> So where a city, with the consent of the original appropriator, takes control of the waters of a certain stream, and distributes them to the inhabitants of the city, the right to exercise such control vests in the city, and it is authorized to maintain a suit to enjoin an individual from diverting the waters to his own use.<sup>2</sup> And in California, where the statute makes a certificate of purchase of lands, issued under the laws of the United States, primary evidence of title in the holder, it is held that a receipt for the purchase-money, issued by a receiver of a United States land-office to an occupant of public lands bordering on a stream, is sufficient *prima facie* evidence of title in the latter to enable him to maintain an action to enjoin an upper riparian proprietor from unlawfully diverting the waters of the stream.<sup>3</sup> The owners in severalty of different tracts of land may join in a bill for injunction to restrain the diversion of the waters of a stream along the banks of which their lands are located, and in which they have riparian rights and rights acquired by appropriation.<sup>4</sup> But it seems that persons so situated cannot unite in an action for damages against one who, at a point above their lands, has wrongfully diverted the waters of the stream, as they have no common interest in the damages, and there is no legal

<sup>1</sup>Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. Rep. 535; Heilbron v. Kings River & F. C. Co., 76 Cal. 11, 17 Pac. Rep. 933; Crook v. Hewitt, (Wash.) 31 Pac. Rep. 28.

<sup>2</sup>City of Springville v. Fuller, (Utah) 27 Pac. Rep. 577.

<sup>3</sup>Conkling v. Pacific Imp. Co., 87 Cal. 296, 25 Pac. Rep. 399.

<sup>4</sup>Churchill v. Lauer, 84 Cal. 233, 24 Pac. Rep. 107.

basis on which they can be apportioned between them.<sup>1</sup> The plaintiff in an action of this character also has the privilege of joining as defendants all persons whose unlawful acts contribute to the deprivation or diminution of his water supply on which he bases his action.<sup>2</sup> And in Colorado it is said that a person who, by priority of appropriation, acquires the better right to the use of water from a natural stream, may maintain an action jointly against all parties junior in right to himself, whenever their acts, either joint or several, substantially interfere with such better right.<sup>3</sup>

The pleadings, in actions of the kind now under consideration, must of course be governed by the ordinary rules. Thus, for instance, it is held that the gravamen of the action is the diversion of the water, and the fact that this diversion is accomplished by several different means is not important enough to require several different counts in the complaint.<sup>4</sup> If the plaintiff claims a superior right by appropriation, the complaint must set forth, with sufficient clearness and fullness, the fact of appropriation, the purpose for which the appropriation was made, and the amount of water necessary to effect such purpose.<sup>5</sup> The claim of interest in the waters which the defendant is supposed to set up should not be alleged by the plaintiff merely on information and belief; but though the complaint may be imperfect in this respect, it will not be open to a general demurrer if it also alleges facts showing a wrongful diversion by the defendant and a threatened continuance thereof.<sup>6</sup>

<sup>1</sup>Foreman v. Boyle, 88 Cal. 290, 26 Pac. Rep. 94.

<sup>2</sup>Hulsman v. Todd, (Cal.) 31 Pac. Rep. 39.

<sup>3</sup>Saint v. Guerrerio, (Colo.) 30 Pac. Rep. 235.

<sup>4</sup>Gage v. Tuolumne Water Co., 14 Cal. 25.

<sup>5</sup>Salazar v. Smart, (Mont.) 30 Pac. Rep. 676.

<sup>6</sup>Hulsman v. Todd, (Cal.) 31 Pac. Rep. 39.

In an action for the unlawful diversion of water from a stream running through plaintiff's land, it is proper to exclude evidence of diversions by persons other than the defendant, at least when it does not appear whether such diversions were lawful or were made with plaintiff's consent.<sup>1</sup> But it appears that such evidence of other diversions may be admissible merely on the issue as to the amount of damages.<sup>2</sup> The gist of the action being the diminution in the flow of the water to plaintiff's land, or through his ditch, it is of course competent for him to show that the acts of the defendant appreciably diminished the volume of water in the stream.<sup>3</sup> And in an action to establish a water right, a written declaration of the amount of water appropriated by the respective parties, which was duly verified and filed for record, may be received in evidence to prove their intention as to the amount of water each was to have under the appropriation, though the statute does not require such declarations to be filed.<sup>4</sup> In regard to the damages to be recovered, it is ruled that the issue should not be limited to the interference with the plaintiff's present use of his property, and the jury should be instructed that the plaintiff's right to recover nominal damages does not depend upon his showing any actual or perceptible injury, but solely upon the question whether the defendant has diverted water so as to reduce materially the volume of water that would otherwise flow to or by plaintiff's land.<sup>5</sup> It is held that the owner of land through which flows a stream of water suitable for a mill-site, but

<sup>1</sup> *Heilbron v. Kings River & F. Co.*, 76 Cal. 11, 17 Pac. Rep. 933; *Lakeside Ditch Co. v. Crane*, 80 Cal. 181, 22 Pac. Rep. 76.

<sup>2</sup> *Gould v. Stafford*, 77 Cal. 66, 18 Pac. Rep. 879.

<sup>3</sup> *Garwood v. New York Cent. R.*

*Co.*, 116 N. Y. 649, 22 N. E. Rep. 396.

<sup>4</sup> *Sweetland v. Olsen*, 11 Mont. 27, 27 Pac. Rep. 339.

<sup>5</sup> *New York Rubber Co. v. Rothery*, (N. Y.) 30 N. E. Rep. 841.

on which there is no mill, may recover, from one who diverts the water, any actual injury he suffers therefrom in the enjoyment of his land, but cannot recover for the loss of water-power which he has neither used nor attempted to use.<sup>1</sup>]

#### § 74. Same; action to quiet title.

[In California (and perhaps in some other states) the courts will take jurisdiction of an action to quiet title to a water-course or to the rights of appropriators therein. And it is held that there need not be an actual interference with the plaintiff's right to use the water in the stream before an action can be brought to quiet title to his rights as appropriator. The assertion of an adverse claim is sufficient.<sup>2</sup> And in the case just cited it was also held that one who has appropriated all the water in a stream for purposes of irrigation may sue persons who afterwards acquire vacant land above the plaintiff's tract and divert a part of the stream to irrigate their crops, to quiet his title to the full flow of the stream. In an action to quiet title to the right to use certain water, where the complaint alleged a right to use the water and "also the right to divert from its natural channel, and to use for irrigating and domestic purposes, all the waters" of the stream, it was held that the words quoted were mere surplusage, and did not vitiate the complaint.<sup>3</sup>]

#### § 75. Equitable jurisdiction.

[It was stated in the preceding section that, where the unlawful diversion is continuing, a court of equity will interfere

<sup>1</sup>Clark v. Pennsylvania R. Co.,  
(Pa.) 22 Atl. Rep. 989.

<sup>2</sup>Peregoy v. Sellick, 79 Cal. 568,  
21 Pac. Rep. 966.

<sup>3</sup>Harris v. Harrison, 93 Cal. 676,  
29 Pac. Rep. 325.

by injunction against the wrong-doer. In order to obtain this assistance from chancery, it is not necessary for the complainant to have recovered his damages at law. "Under our Codes," say the California court, "the riparian proprietor is not required to establish his right at law by recovering a judgment in damages before applying for an injunction. The decisions (in cases of alleged nuisances) based on the failure of the complainant to have had his right established at law have no appositeness here. Here the plaintiff must, indeed, clearly make out his right in equity, and show that money damages will not give him adequate compensation. If he fail to do this, relief in equity will be denied; but, if he proves his case, relief will be granted, although he has not demanded damages at law. In the case at bar, the plaintiffs do not admit that damages would constitute compensation, and ask for an injunction until they shall recover such compensation in an action for damages. The decisions which bear on that class of cases, and which require of the plaintiff to show that he has promptly sought redress at law, have little applicability."<sup>1</sup> And indeed it is settled that an action of ejectment will not lie to recover possession of a water-course.<sup>2</sup>

Since a court of equity may grant or withhold its aid according to the circumstances, its intervention can only be secured by the presentation of a substantial case. Thus, each riparian proprietor has a right, within his own territory, to the use of the water as it flows, returning it to the channel of the stream for the use of others below; but if the water may be conveniently used by two riparian owners, without strictly enforcing such right, a court of equity may refuse to lend its aid; and accordingly it has been held that a riparian owner would not be

<sup>1</sup> *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 688.

<sup>2</sup> *Swift v. Goodrich*, 70 Cal. 103, 11 Pac. Rep. 561; *Ang. Water-Courses*, § 8.

enjoined from taking water from a river for the use of his mill, although it was not returned to the channel of the river before it reached the territory of an adjoining owner, where it was not clear from the evidence that such adjoining owner could not use the water, with substantially the same results, through the race of the defendant's mill.<sup>1</sup> And, further, equity has jurisdiction for taking the necessary steps to make its decrees effectual. Hence, when the court has jurisdiction to grant an injunction restraining the unlawful diversion of waters, it may also require the defendant to remove the obstructions by means of which the diversion is effected.<sup>2</sup> And where, in an action to establish the right to the water in a stream, the court finds, on sufficient evidence, that the parties have each certain rights in the stream, it may secure enjoyment of those rights by proper regulation of the use of the water.<sup>3</sup> And the fact that a complaint prayed only for an injunction against a threatened diversion of water, and that at the time of its filing defendant had already begun to do so, will not prevent the issuance of an injunction against the continued wrongful diversion.<sup>4</sup>

Unless the flow of a stream to the land of a riparian proprietor has been appreciably or perceptibly diminished, he is not entitled to an injunction against another for wrongfully diverting water from the stream.<sup>5</sup> But at the same time, as stated in

<sup>1</sup>Mason v. Cotton, 4 Fed. Rep. 792.

<sup>2</sup>Johnson v. Superior Court of Tulare Co., 65 Cal. 567, 4 Pac. Rep. 576; Atchison, T. & S. F. R. Co. v. Long, 46 Kans. 701, 27 Pac. Rep. 182. Where defendant has a right to divert the water to the full capacity of a 1½ inch pipe, he is not injured by an injunction restraining him from using a 6 inch pipe if the 1½ inch pipe takes all the

water of the stream. Conkling v. Pacific Imp. Co., 87 Cal. 296, 25 Pac. Rep. 399.

<sup>3</sup>Barrows v. Fox, (Cal.) 30 Pac. Rep. 768.

<sup>4</sup>Conkling v. Pacific Imp. Co., 87 Cal. 296, 25 Pac. Rep. 399.

<sup>5</sup>Moore v. Clear Lake Water Works, 68 Cal. 146, 5 Pac. Rep. 494; Creighton v. Kaweah Canal Co., 67 Cal. 221, 7 Pac. Rep. 658; Barrows v. Fox, (Cal.) 30 Pac. Rep.



a late case, a continuous wrongful diversion of water will be restrained in equity at the instance of a prior appropriator thereof, although no actual damages are averred or proved; the relief being granted in such cases to prevent the wrongful acts from ripening into a right.<sup>1</sup> And though the complaint, in an action to restrain the diversion of a stream from the course in which plaintiff claims he is entitled to have it flow, as riparian owner and prior appropriator, alleges that damages to the land will result from the diversion, yet the court need not find on the issue of damages, since the plaintiff is entitled to an injunction, whether such damages result or not.<sup>2</sup> Hence, also, the complaint in an action by an appropriator of water, to restrain the unlawful diversion of the stream, need not allege that the plaintiff is in a position to use the water himself, or that he is in any position which gives him a right to furnish it to others; but it is sufficient to allege that he has a right to the use and enjoyment of the water.<sup>3</sup> So the riparian owner is entitled to the aid of equity to enjoin a diversion, notwithstanding he may have made no use of the water-power himself, or sustained but small pecuniary damages, and although the defendant may be subjected to heavy expense if compelled to restore the water to its original channel.<sup>4</sup> A complaint which alleges that defendants threaten to divert the water from plaintiff's water-power, that defendants claim the right and have the ability to do it, and that they will do so unless restrained, presents a case for the

768; *Wintermute v. Tacoma Water Co.*, 3 Wash. St. 727, 29 Pac. Rep. 444.

<sup>1</sup> *Moore v. Clear Lake Water Works*, 68 Cal. 146, 8 Pac. Rep. 816; *Conkling v. Pacific Imp. Co.*, 87 Cal. 296, 25 Pac. Rep. 399; *Spar-gur v. Heard*, 90 Cal. 221, 27 Pac. Rep. 198; *Franklin v. Pollard Mill*

*Co.*, 88 Ala. 318, 6 South. Rep. 685.

<sup>2</sup> *Mott v. Ewing*, 90 Cal. 231, 27 Pac. Rep. 194.

<sup>3</sup> *Moore v. Clear Lake Water Works*, *supra*.

<sup>4</sup> *Weiss v. Oregon Iron Co.*, 13 Or. 496, 11 Pac. Rep. 255; citing *High, Inj.* § 795.

exercise of equitable jurisdiction to prevent a threatened injury.<sup>1</sup>

In regard to the *parties* to actions of this character, the rule seems to be established that, where each of two defendants made a diversion of the water for his own benefit, separately from the other, and without any collusion or joint action between them, a joint action to recover damages for such diversion is not maintainable.<sup>2</sup> Under the peculiar system of "irrigating ditches," prevailing in some of the states and territories, it is held that the owners of irrigated lands, who have the right to take water from such a ditch, may bring suit for an injunction against one who wrongfully diverts water from the ditch to their injury, though the ditch be the property of another. "Though the owners of the ditch are entitled to toll for the water, the owners of the land are entitled to the water on payment of the toll. The diversion of the water from the ditch would injure the owner of the ditch, it is true, but it would also injure the owner of the land to be irrigated, to deprive him of the water. The owner of the ditch, for many reasons, might decline to sue. He might be in collusion with the wrong-doer to destroy the value of plaintiff's lands, in the hope of buying them. He might be actuated by private malice. He might, from motives of economy, refuse to embark in a lawsuit of this character. The rights of plaintiff would be of little value if they were subject to the interest, whim, or caprice of the owner of the ditch."<sup>3</sup>

It is of course a good defense to an action of this character that the defendant is a riparian owner on the stream, and as such has rights superior to those of the plaintiff, whether the latter claims as an appropriator or as a lower riparian owner. But an answer which merely alleges that

<sup>1</sup> *Kimberly v. Hewitt*, 75 Wis. 371, 44 N. W. Rep. 303. See, also, *Carpenter v. Gold*, (Va.) 14 S. E. Rep. 329.

<sup>2</sup> *Evans v. Ross*, (Cal.) 8 Pac. Rep. 88.

<sup>3</sup> *Clifford v. Larrien*, (Ariz.) 11 Pac. Rep. 397. ✓

the defendant is the owner of land through which the stream flows for a distance of about three miles, and that most of the land is susceptible of irrigation and would be benefited thereby, is not sufficient to raise any issue as to his right to take water by virtue of his riparian ownership, in the absence of an allegation that he was entitled as riparian owner to any definite amount of water, or what portion of the stream he could exhaust for irrigating, or whether his land was located above or below the point of plaintiff's diversion.<sup>1</sup> And when a party has acquired a prior right to the water of a natural stream by a valid appropriation thereof to a beneficial use, another party cannot justify an interference with such prior right by merely showing that he is wholly dependent upon the same supply of water; but in an equitable proceeding, for some purposes, even though not as a bar to such prior right, it may be proper for defendant to allege such dependence in connection with other averments of the answer; and it is not error to refuse to strike out such matter, unless it is made to appear that its retention, in some way, may have improperly affected the final decision of the cause.<sup>2</sup> It is always available for the defendant to show, as ground for refusing the injunction, that the stream or water in question is not a natural water-course;<sup>3</sup> or that the works or operations complained of have not obstructed the natural flow of the stream;<sup>4</sup> or that the diversion or obstruction of the stream was effected with the plaintiff's consent or acquiescence.<sup>5</sup>

In an action on an injunction bond to recover damages for loss of plaintiff's crops, by reason of his being restrained from

<sup>1</sup>Riverside Water Co. v. Gage, 89 Cal. 410, 26 Pac. Rep. 889.

<sup>2</sup>Roberts v. Arthur, 15 Colo. 456, 24 Pac. Rep. 922.

<sup>3</sup>Raymond v. Wimsette, (Mont.) 31 Pac. Rep. 537.

<sup>4</sup>Sparlin v. Gotcher, (Oreg.) 31 Pac. Rep. 399.

<sup>5</sup>Churchill v. Baumann, 95 Cal. 541, 30 Pac. Rep. 770.

using the water in a certain ditch, the evidence showed that there was a great scarcity of water, and that it could not have reached the plaintiff's lands, whereupon a verdict for nominal damages was rendered and sustained; and it was further held that where a party sues for damages for such a cause, if it is shown that he could have obtained water from another source, he will not be entitled to receive a greater sum than he would have had to expend to obtain water from such source.<sup>1</sup>

The prior locator of a mining claim on the bank of a stream has a right to the use of the bed of the stream for the purpose of fluming or working his claim, and may recover damages for the obstruction of such right by parties who subsequently erect dams or embankments upon the stream, by reason of which he is hindered from working his claim by flumes or other necessary means or appliances.<sup>2</sup>]

### § 76. Deterioration of quality of water.

With respect to deterioration in the *quality* of the water, caused by subsequent locators or claimants higher up the stream, there was at an early day some doubt; but the rule is now settled that an interference of this kind producing injury will be treated in the same manner as an interference with the quantity. In the early case of *Bear River, etc., Co. v. New York M. Co.*<sup>3</sup> the plaintiff was the prior appropriator of water for mining purposes. The defendants took the water at a point higher on the stream, used it for their mining purposes, and then sent it down the stream undiminished in quantity, but filled with mud, sand, gravel, and other mining *debris*. In regard to this the court, after stating the rule concerning diminution in quantity, said: "As to deteriorations in *quality* by the water being used for mining above the plaintiff, this is *damnum absque injuria*. Any

<sup>1</sup> *Mack v. Jackson*, 9 Colo. 536,  
13 Pac. Rep. 542.

<sup>2</sup> *Sims v. Smith*, 7 Cal. 148.  
<sup>3</sup> 8 Cal. 327.

other rule would prohibit any use of the whole water of a stream, so as to preserve a small quantity of it first appropriated." The conclusion reached in this decision was antagonistic to the claims of the prior appropriator, and, if final, would plainly render his rights very precarious, and liable, in fact, to complete destruction by such a pollution of the water as would make it wholly unfit for his purposes. In the subsequent case of *Hill v. Smith*<sup>1</sup> this former decision was entirely abandoned, and a rule was established which fully protects all the rights of the prior appropriator. The court held that if parties engaged in mining operations above the head of a ditch belonging to a prior appropriator, on the same stream, injure the water by means of mud, sand, sediment, or other mining *debris*, they are liable therefor to the ditch-owner, and their liability is not at all a question of negligence or unskillfulness. If the ditch-owner is *in fact* injured, the miners are liable, even though such injury is not caused by their negligent or unskillful methods of mining. As between ditch-owners and miners using the same stream, the law does not tolerate *any* injury by one to the prior rights of the other. In regard to the basis of these rights, the court say that the reasons which underlie the common-law rules concerning riparian rights have not lost their force in the mineral regions of this state. The rule thus settled cannot be restricted to the pollution of water by mining operations alone. It must extend to all modes of deteriorating the quality of water by which injury is done to a prior appropriator. This view is taken of it by the supreme court of Utah, which holds that when the water of a stream had been appropriated and diverted by a ditch for purposes of irrigation and for domestic uses, the pollution of the stream above the ditch is a private nuisance.<sup>2</sup>

<sup>1</sup>27 Cal. 476; and see s. c. 32 Cal. 166.

<sup>2</sup>*Cramer v. Randall*, 2 Utah, 248.

## II. LIABILITY FOR DAMAGES CAUSED BY DITCHES.

## § 77. Various kinds of injuries.

It seems proper, in this connection, to consider very briefly the liabilities of ditch-owners, miners, appropriators, and other parties using waters as before described, for injuries caused or occasioned by such use to adjoining proprietors and occupants. These injuries may be of various kinds, resulting from negligence, unskillfulness, design, intentional trespass, from the methods in which the use of the water is ordinarily conducted, and the like. I shall examine these different species or types of injury separately.

## § 78. Damages caused by breaking or overflow.

*First*, where the injury is not intentional, nor resulting from the ordinary and constant mode of using the water, but is caused by the breaking or overflow of ditches, reservoirs, dams, and other structures, lawfully erected for the purpose of appropriating the water to legitimate uses. The doctrine is settled by the English courts that whenever a party lawfully constructs a reservoir, embankment, dam, or other artificial structure on his own land, for the purpose of catching, impounding, or retaining water, he thereby becomes an *insurer* of the safety of his adjoining or neighboring proprietors and occupants against all possible injury occasioned by his structure. He is absolutely liable to a neighboring proprietor or occupant for all injury done to the latter through a bursting or overflow of his reservoir or other structure, entirely irrespective of any negligence or want of skill in its erection or management, and even though the accident was caused by an unusual storm, flood, or other so-called "act of God." The English decisions have not been followed in all our American states. The doctrine which they establish has

been rejected by the courts of California, and pronounced entirely inapplicable to the mining and water interests of the Pacific communities. It has been settled, by a series of well-considered decisions, that ditch-owners and proprietors of similar works are only bound to use that amount of care, skill, and diligence in the erection, maintenance, and use of their reservoirs, ditches, canals, flumes, and the like, which an ordinarily prudent man uses in the management of his own affairs of the same kind and under the same circumstances. I will refer to a few of the leading cases in which this test of liability was judicially settled.

In one of the earliest of these cases the action was brought to recover damages caused by the bursting of defendant's dam, whereby the plaintiff's land was overflowed and injured. The right to recover was based upon an allegation that the dam was constructed in a careless and insufficient manner. Held, that such a claim presented a good cause of action; and if the dam was thus constructed, and the bad construction was the proximate cause of the bursting and overflow, the defendant was liable. But the court at the trial had charged the jury as follows: "If the jury believed that the dam was improperly constructed, *or that the defendant could have constructed it in a better or more substantial manner, so as to prevent its breaking*, then the defendant was liable." This charge was held to be erroneous. It presented the defendant's duty and liability in too broad a manner. The question is not what the defendant *could* possibly have done, but what discreet and prudent men should do, or *ordinarily* do, in such cases, where their own interests are to be affected.<sup>1</sup>

Wolf v. St. Louis, etc., Co.<sup>2</sup> was a similar action, to recover damages for the overflowing of plaintiff's land through the neg-

<sup>1</sup> Hoffman v. Tuolumne, etc., Co., 10 Cal. 413.

<sup>2</sup> 10 Cal. 541.

ligent construction and use of defendant's flume. On the trial the court charged that defendant was bound, in the construction and management of its dam and flume, to use all the care which a *very* prudent owner would use under the like circumstances. This instruction was pronounced error; that the owner of a flume, ditch, reservoir, etc., is bound to use that care and caution, in the construction and management of his water-works, to prevent injury to others, which *ordinarily prudent* men use in like instances in their own affairs; and that the question of negligence in such cases must largely depend upon all the surrounding circumstances. In a similar action to recover damages from the overflowing of plaintiff's land by the breaking of defendant's dam, the defendant was held liable for negligence in building and using the dam, whereby the water overflowed the lands of the plaintiff. The court added the further most important rule governing this class of cases, that the doctrine of contributory negligence on the part of the plaintiff could not apply to an injury caused by such negligence of the defendant; that a want of reasonable care on the plaintiff's part could not be set up as a defense to such an action.<sup>1</sup>

### § 79. Proper measure of care required.

While the English doctrine is extreme in one direction, it may well be doubted, I think, whether this rule does not go too far in the other extreme, and impose an insufficient liability upon the owners of water-works. Since these structures are necessarily dangerous to neighboring proprietors, and since the injury caused by their accidental bursting or overflow is necessarily great, it would seem just that their owners should be re-

<sup>1</sup>Fraser v. Sears, etc., Co., 12 Cal. 556. As laying down the same general test of liability, see, also, Todd v. Cochell, 17 Cal. 98; Tenney v. Miners' Ditch Co., 7 Cal. 335;

Campbell v. Bear River, etc., Co., 35 Cal. 679; Richardson v. Kier, 34 Cal. 63, 74, and 37 Cal. 263. And see Parker v. Larsen, 86 Cal. 236, 24 Pac. Rep. 989.



quired to use all reasonably *possible* means in their construction and management to prevent accidental injuries thereby. I would venture to suggest that the rule as laid down by the trial court in the case of Hoffman v. Tuolumne, etc., Co., above quoted, would be more reasonable and just to *all* the parties interested than the one finally adopted by the court. These dams, reservoirs, and other structures, in their essentially dangerous nature, have some analogy, at least, to railways, and the same test of liability might, under their respective circumstances, be appropriately applied to each.<sup>1</sup>

It was also held by the supreme court of Nevada that a dam erected on a stream, in a manner in no wise injurious or prejudicial at the time of its erection to a mill above, but which, by reason of circumstances that could not have been anticipated, happening subsequently, and operating in connection with it, causes the water to flow back upon the mill, is not such an obstruction as to authorize its abatement, or to justify a recovery of damages against the person building it.<sup>2</sup>

<sup>1</sup>[In the recent case of Weid-kind v. Tuolumne Water Co., 65 Cal. 431, 4 Pac. Rep. 415, Sharpstein, J., observed: "It was proper to instruct the jury as to the degree of care and vigilance which the law devolved on the defendant in the construction and maintenance of its dam, and that, if it neglected or failed to exercise that degree of care and vigilance, it would be liable for such damages as any one might suffer from the dam's breaking away. But when the court went beyond that, and instructed the jury that the dam was 'insufficiently and negligently constructed' unless it had gates sufficient

for a certain purpose, it charged with respect to a matter of fact. The court might as well have charged them that, if the dam was not of certain dimensions or constructed of a particular kind of material, it was insufficiently and negligently constructed. The defendant had a right to have the opinion of the jury on those questions. And we think the court erred in charging that 'it was the duty of the defendant to *constantly* examine said dam during the season of freshets.' That might depend on circumstances, and should have been left to the jury."]

<sup>2</sup>Proctor v. Jennings, 6 Nev. 83,

**§ 80. Injuries from intentional trespasses.**

*Secondly*, where the injuries are intentional trespasses. In these instances the proprietors of the water-works are, of course, liable without regard to any question of negligence or lack of skill. The law does not permit one person, under color of a right to appropriate, divert, or use the water of a public stream, to trespass upon the lands or invade the existing rights of another party. Thus it is expressly held that the statutes of congress of 1866 and 1870 merely confirm such rights of water on the public lands as were accorded to the owners of mining and other claims by the state customs, laws, and decisions prior to their enactment. These statutes do not grant any rights *not* recognized by such local customs and laws. They do not authorize A., while engaged in constructing a ditch for water, to excavate it across the mining claim of B., which was located previously to the location of the ditch.<sup>1</sup> In another case a ditch conducted water from a stream over the adjacent country, crossing other small natural water-courses, the beds of which were dammed up by the embankment of the ditch, and by the fall of rain the waters of the streams became so swollen as to render it necessary to cut the embankment of the ditch in order to preserve it from injury; and the owners of the ditch cut the embankment at a point where there was no natural water-course, so that the waters were turned onto the cultivated land of the plaintiff, causing damage. Held, that the injury thereby sustained was not an act of God, but resulted from the voluntary act of the ditch-owners, and they were liable to the plaintiff for the damage. A. may not, in order to save his own property, destroy the property of B., however urgent the necessity.<sup>2</sup>

<sup>1</sup>Titcomb v. Kirk, 51 Cal. 288;  
and see, also, Henshaw v. Clark,  
14 Cal. 461; Boggs v. Merced M.  
Co., 14 Cal. 282, 379.

<sup>2</sup>Turner v. Tuolumne, etc., Co.,  
25 Cal. 398.

**§ 81. Damages from mode of construction or operation of works.**

*Thirdly*, where the injury is not an intentional trespass, nor merely the result of negligence, but is the natural or necessary consequence of the mode in which the water-works are constructed, or in which they are ordinarily operated. In some of the instances placed in this group, the wrong may approach very nearly to an intentional trespass, while in others it may involve negligence; but, on the whole, these cases constitute a separate and distinct class. The forms of such injuries are various. One form consists in the discharge of the water, after its use, directly upon the lands of another person, or its discharge in such a place and manner that it naturally and necessarily flows down upon the lands of a neighboring proprietor. In the important case of *Richardson v. Kier*<sup>1</sup> the defendant Kier owned a ditch passing over and across Richardson's land. In regard to the general duty of the ditch-owner under these circumstances, the court said: "He [the ditch-owner] is bound so to use his ditch as not to injure the plaintiff's land, irrespective of the question as to which has the older right or title. He is bound to keep it in good repair, so that the water will not overflow or break through its banks, and destroy or damage the lands of other parties; and if, through any fault or neglect of his in not properly managing and keeping it in repair, the water does overflow or break through the banks of the ditch, and injure the land of others, either by washing away the soil or by covering the soil with sand, the law holds him responsible." In regard to the discharge of the water after use upon the land of an adjacent owner, the court further held: "When Kier discharged his water from his ditch above Richardson's land, in such a place that it naturally would and did flow over and upon and

<sup>1</sup>34 Cal. 63, 74.

injure R.'s land, K. is liable for the injury so done. It is no excuse that he may have sold the water to miners, by whom it was used before it reached R.'s land and did the injury. If the miners thus contributed to the injury, and are joint tortfeasors with K., this is no defense to a suit against him." The same liability has been imposed upon the owners of water-works under like circumstances, and for similar injuries in other cases.<sup>1</sup>

<sup>1</sup>See *Richardson v. Kier*, 37 Cal. 263; *Blaisdell v. Stephens*, 14 Nev. 17; *Henshaw v. Clark*, 14 Cal. 461; *Grigsby v. Clear Lake W. Co.*, 40 Cal. 396. [*Waste Water*. Where a riparian owner, for the purpose of irrigation, leads water upon his land, he cannot send down the surplus upon lands lying lower than his own; at least in such a manner as to injure the lower estate. The lower lands are under a natural servitude to receive the ordinary drainage, but this burden cannot be increased by the acts of the upper proprietor. *Boynton v. Longley*, 19 Nev. 69, 6 Pac. Rep. 437. A person owning a ditch, from which water escapes upon the premises of an adjoining land-owner, cannot escape liability on the ground that such land-owner might, at a small expense, have prevented any damage by digging a ditch on his own land that would have carried off the waste water. *McCarty v. Boise City Canal Co.*, (Idaho,) 10 Pac. Rep. 623. *Changing Channel of Stream*. One who changes the course of a natural stream of water, and discharges it on his neighbor's land, is liable to the latter for damages. *Vernum v. Wheeler*, 35 Hun, 53. A person owning land abutting on a river, through which a creek flows and empties into the

river, may, as against proprietors on the other side of the river, change the channel and mouth of the creek upon his own land, and for his own protection and convenience, if, in so doing, both in the inception and execution of the work, he exercises reasonable care and caution not to injure the rights of others. If, however, the opposite bank of the river is subject to inundation and overflow in case of unusual but not unprecedented floods in the river, such change in the channel and mouth of the creek cannot rightfully be made, if thereby, in the exercise of ordinary prudence and foresight, increased danger of inundation and overflow on the opposite side of the river might be anticipated. *Railroad Co. v. Carr*, 38 Ohio St. 448. *Dams and Bulk-Heads*. A riparian owner may protect his land from a threatened change in the channel of the stream, liable to occur by reason of the washing away of his bank, and in pursuance thereof may build a bulk-head as high as was his original bank before it was washed away; and this will not deprive the opposite owner of any right, nor give him legal ground for complaint. *Barnes v. Marshall*, 68 Cal. 569, s. c. 10 Pac. Rep. 115.]

**§ 82. Discharge of mining debris.**

Another form of the injury, for which the courts have given the remedy of compensatory damages or of injunction, consists in such a use and discharge of the water that it naturally and necessarily flows down upon the lands of adjoining proprietors, charged with mud, sand, gravel, and other mining *debris*; which material, being thus carried and deposited upon such adjacent lands, injures or even destroys them for all beneficial uses.<sup>1</sup> In *Wixon v. Bear River, etc., Co.* an injunction was granted restraining the defendant from allowing the water, mud, sediment, or sand collecting in its ditch or reservoir, from flowing down into the plaintiff's garden, and ruining his crops. The court said: "The instructions refused by the court at the trial are founded upon the theory that in mineral districts of this state the rights of miners and persons owning ditches constructed for mining purposes are paramount to all other rights and interests of a different character, regardless of the time or mode of their acquisition, thus annihilating the doctrine of priority in all cases where the contest is between a miner or a ditch-owner and one who claims the exercise of any other kind of right, or the ownership of any other kind of interest. To such a doctrine we are unable to subscribe, nor do we think it clothed with a plausibility sufficient to justify us in combating it." In *Levaroni v. Miller* an injunction was granted under very similar circumstances, although the fact appeared or was found that the injury was not done by defendants maliciously or unnecessarily, but in the ordinary conduct of their business. In another type of the same injury the mud, sand, gravel, and other *debris* are discharged by the ordinary mode of use into a stream, and are carried down by the natural flow of the current, and deposited

<sup>1</sup>*Logan v. Driscoll*, 19 Cal. 623; Cal. 367; *Levaroni v. Miller*, 34 Cal. 231.  
*Wixon v. Bear River, etc., Co.*, 24

upon the lands of proprietors adjoining the stream in its lower portions, perhaps many miles below the point of discharge.<sup>1</sup>

**§ 83. Effects of hydraulic mining a public nuisance.**

[Within the last few years a number of cases have been decided on the Pacific coast, in reference to the effects of the system of hydraulic mining, which threaten to interpose an effectual barrier to the further prosecution of that species of industry. These decisions are of such immediate importance that they require a somewhat extended notice. Their position, however, may first be briefly stated as follows: The discharge of sand, gravel, and other *debris* into the navigable rivers of the state, as a consequence of mining by the hydraulic process, with the effect to fill up the beds of such rivers or obstruct the course of navigation, is a public nuisance, which may be enjoined at the instance of the state on the relation of those injured; and if, as a further consequence of such operations, the sand and *debris* is deposited on the lands of riparian owners, it is a private injury, and they may also have relief by injunction. The first case of importance was that of *Woodruff v. North Bloomfield Gravel Min. Co.*, decided in the United States circuit court for the district of California in 1884.<sup>2</sup> The facts were stated as follows: The Yuba river rises in the Sierra Nevada mountains, and, after flowing in a westerly direction about twelve miles across the plain after leaving the foot-hills, joins the Feather. At the junction, within the angle of these two rivers, is situated the city of Marysville. The Feather thence runs about thirty miles,

<sup>1</sup> *Robinson v. Black Diamond, etc., Co.*, 50 Cal. 461, and 57 Cal. 412, s. c. 40 Amer. Rep. 118; *Woodruff v. North Bloomfield, etc., Co.*, 8 Sawy. 628, s. c. 16 Fed. Rep. 25; and see *Lockwood Co. v. Law-*

*rence*, 77 Me. 297; *Red River Roller Mills v Wright*, 30 Minn. 249, 15 N. W. Rep. 167.

<sup>2</sup> *Sawy. 441, s. c. 18 Fed. Rep. 753.*

and empties into the Sacramento. These three rivers were originally navigable for steam-boats and other vessels for more than a hundred and fifty miles from the ocean, at least as far as Marysville; the Sacramento being navigable for the largest-sized steamers. The defendants have for several years been and they are still engaged in hydraulic mining, to a very great extent, in the Sierra Nevada mountains, and have discharged and are discharging their mining *debris*,—rocks, pebbles, gravel, and sand,—to a very large amount, into the head-waters of the Yuba, whence it is carried down, by the ordinary current and by floods, into the lower portions of that stream, and into the Feather and the Sacramento. The *debris* thus discharged has produced the following effects: It has filled up the natural channel of the Yuba above the level of its banks, and of the surrounding country, and also of the Feather below the mouth of the Yuba, to the depth of fifteen feet or more. It has buried with sand and gravel, and destroyed, all the farms of the riparian owners on either side of the Yuba, over a space two miles wide and twelve miles long. It is only restrained from working a similar destruction to a much larger extent of farming country on both sides of these rivers, and from in like manner destroying or injuring the city of Marysville, by means of a system of levees, erected at great public expense by the property owners of the county, and inhabitants of the city, which levees continually and yearly require to be enlarged and strengthened to keep pace with the increase in the mass of *debris* thus sent down, at a great annual cost, defrayed by means of special taxation. It has polluted the naturally clear water of these streams so as to render them wholly unfit to be used for any domestic or agricultural purposes by the adjacent proprietors. It has, to a large extent, filled the beds and narrowed the channels of these rivers, and the navigable bays into which they flow, thereby lessening and injuring their navigability, and impeding and en-

dangering their navigation. All these effects have been continually increasing during the past few years, and their still further increase is threatened by the continuance of the defendants' said mining operations. On this state of facts it was held that the acts complained of, unless authorized by some law, constituted a public and private nuisance, and might be enjoined.

The defendants, first seeking the support of legislation for their acts, alleged that both congress and the legislature of California had authorized the use of the navigable waters of the Sacramento and Feather rivers for the flow and deposit of mining *debris*; and, having so authorized their use, all the acts complained of were lawful, and the results of those acts could not, therefore, be a nuisance, public or otherwise. "It is not pretended," said the court, "that either congress or the legislature of California has anywhere, in express terms, provided that the navigable waters of the state may be so used, but this authority is sought to be inferred from the legislation of both bodies, recognizing mining as a proper and lawful employment, and encouraging this industry, knowing that mining of the kind complained of could only be carried on successfully by discharging the *debris* into the streams in the mining regions, which must, from the necessity of the case, find its way into the navigable waters of the state. As to congress, it might be sufficient to say that it has no authority whatever to say what shall or what shall not constitute a nuisance within a state, except so far as it affects the public navigable waters, and interferes with foreign or interstate commerce, or obstructs the carrying of the mails. Under its authority to regulate commerce between the states, and to establish post-roads, congress may doubtless declare and punish as such the obstruction of the navigable waters of the state, as a nuisance to interstate and foreign commerce, but there its authority ends. The necessary results of the acts complained of clearly constitute a public and private nuisance, both



at common law and within the express language of the Civil Code of California." The court then proceeded to show that these acts were neither authorized nor justified by the act of congress of 1866, recognizing and regulating mining on the public lands of the United States; nor by the river and harbor bills of 1880 and 1882, for the improvement of the navigable rivers of California, although these acts recognize the injuries above described as existing facts; nor by the legislation of California regulating mining operations, or purporting to permit the condemnation of lands for the use of miners, (Code Civil Proc. § 1238, sub. 5;) nor by the act of 1878, concerning the Sacramento and San Joaquin rivers, and recognizing the injuries above described from the mining *debris*. And the court took occasion to remark that congress would have no power, even by express statute, to authorize a public nuisance destroying or materially obstructing the navigability of the streams within a state, for purposes wholly unconnected with the subjects of commerce or post-roads. Further, if there were any statute of the state of California expressly authorizing the acts of the defendants, and the injuries caused by them, it would be in conflict with the fourteenth amendment of the constitution of the United States, and with similar provisions in the organic law of the state. Such legislation would either deprive the complainant and others of their property without due process of law, or would take or damage their property for an alleged public use without compensation. The defendants were therefore stripped of all color of statutory authority for their wrongful acts.

But the defendants further claimed a right to do the acts complained of by prescription. The court, however, showed very conclusively from the authorities that there can be no such thing as a right to commit or continue a public nuisance, acquired by prescription. "It is a familiar principle that no lapse of time can confer the right to maintain a nuisance as against

the state.”<sup>1</sup> The last contention of the defendants was that their acts were authorized by the customs of miners, which had been recognized and confirmed by the legislation both of the state and of congress. But the court held otherwise; showing that a custom which should authorize the acts complained of, if any such existed, would be “in conflict with the laws and constitution of the state,” and would therefore be illegal and void. Such is an outline of this important case. The opinion—an able and exhaustive statement of the law—was delivered by Judge Sawyer.

The next of the cases to which we have referred, and one of equal importance, is that of *People v. Gold Run Ditch & Min. Co.*, in the supreme court of California, 1884.<sup>2</sup> We give the statement of facts in the language of the court: “The record of the case shows that the Gold Run Ditch & Min. Co. has been since August, 1870, a corporation existing under the laws of the state of California, for the purpose of mining by the hydraulic process, and selling water to miners and others; and that it is now, and its predecessors have been for several years last past, in possession of five hundred acres of mineral land, situated adjacent to the North Fork of the American river, and of certain mines on said land, which it works by the hydraulic process. The natural surface of this land lies about one thousand feet above the river; and all the material of the mines upon the land—consisting of about twenty million cubic yards of material, composed mostly of sand, gravel, small stones, cobbles, and bowlders, mixed with small particles of gold—is capable of being worked off into the river. For the purpose of mining this tract of land by the hydraulic process, the company has conducted to its mines, by means of ditches and iron pipes, a large quantity of water, which it uses, and will continue to use, un-

<sup>1</sup>Citing Wood, Nuis. 790-792; Cooley, Torts, 613.

<sup>2</sup>66 Cal. 133, 4 Pac. Rep. 1152.

der a vertical pressure of several hundred feet, discharging water through 'Little Giants' and 'Monitors,' and dumping all the tailings from its mines into the river. In that manner it has been carrying on its mining operations upon said land for about eight years last past; and up to the time of commencing this action, and during about five months of each year of said period, has been daily discharging into the said river between four and five thousand cubic yards of solid material from its said mine, to-wit, of bowlders, cobbles, gravel, and sand, making a yearly discharge of at least six hundred thousand cubic yards, and will continue to discharge that quantity annually if the working of said mine be permitted to continue, and at such rate it will require some thirty years to mine out and exhaust said mineral land. Of the material thus discharged into the river a large portion has been washed, from the place of discharge or dump, down the river, and, commingled with tailings from other hydraulic mines, and still other material which is the product of natural erosion, has been deposited in the beds and channels of the American and Sacramento rivers and their confluents, but mostly in the American, and upon lands adjacent to both rivers. The deposits of this material upon the beds and along the channels of the rivers, and through the Suisun bay, and into the San Pablo and San Francisco bays, have already filled and raised the beds of both rivers. The bed of the American has been raised from ten to twelve feet, and in some places more, and the bed of the Sacramento, to a great extent below the mouth of the American, from six to twelve feet. In consequence, the beds of the two rivers have shallowed, and their channels widened, so that the depths of the rivers have greatly lessened, and their liability to overflow has been materially increased, causing the frequent floods to extend their area, and to be more destructive than they otherwise would have been, and covering thousands of acres of good land in the Sacramento valley with mining *de-*

*bris*. And as the rivers are at all times carrying in suspension the lighter earthy matter from the mines, and washing down the heavier *debris*, they are likely to fill more rapidly in the future in proportion to the quantity of hydraulic tailings than in the past, and to cause much further and greater injury in the future to large tracts of land; probably rendering them, within a few years, unfit for cultivation and inhabitancy. Besides, the discharge from the mines so fouls the water of the American river at all points below as to make it unfit for any domestic use by the inhabitants. And, from the same cause, the navigation of the Sacramento river has been so greatly impaired that the river, which, until the year 1862, was navigated as far as the city of Sacramento without difficulty by steamers of deep draught, to-wit, by boats drawing nine or ten feet of water, has been, since the year 1862, innavigable as far as the city of Sacramento by boats of deep draught, except during high water, instead of at all times, as formerly. And there is imminent danger, if the acts of the defendant and others engaged in hydraulic mining are allowed to continue, that the beds and channels of the lower portion of the American river, and of the Sacramento river below the mouth of the American, will be so filled and choked up by tailings and other deposits that said rivers will be turned from their channels, cutting new water-ways, injuring or destroying immense tracts of land, and probably will result in greatly impairing the navigability of the Sacramento river."

The court held that a perpetual injunction against the hydraulic operations of the defendant was rightly issued, inasmuch as the acts complained of constituted a public nuisance. "As a navigable river," said McKee, J., "the Sacramento is a great public highway, in which the people of the state have paramount and controlling rights. These rights consist chiefly in a right of property in the soil, and a right to the use of the

water flowing over it, for the purposes of transportation and commercial intercourse. The soil of a navigable river is the *alveus* or bed of the river; the river itself is the water flowing in its channel. An unauthorized invasion of the rights of the public to navigate the water flowing over the soil is a public nuisance; and an unauthorized encroachment upon the soil itself is known in law as a *purpresture*. \* \* \* Great water highways belong to the same class of public rights, and are governed by the same general rules applicable to highways upon land. Any contracting or narrowing of a public highway on land is a nuisance, and all unauthorized intrusions upon a water highway for purposes unconnected with the rights of navigation or passage are nuisances. \* \* \* To make use of the banks of a river for dumping places, from which to cast into the river annually 600,000 cubic yards of mining *debris*, consisting of boulders, sand, earth, and waste materials, to be carried by the velocity of the stream down its course, and into and along a navigable river, is an encroachment upon the soil of the latter, and an unauthorized invasion of the rights of the public to its navigation; and when such acts not only impair the navigation of a river, but at the same time affect the rights of an entire community or neighborhood, or any considerable number of persons, to the free use and enjoyment of their property, they constitute, however long continued, a public nuisance. \* \* \* But it is contended that, as the nuisance complained of, and found by the court, was the result of the aggregate of mining *debris* dumped into the stream by the defendant and other mining companies, acting separately and independently of each other, the acts of the defendant cannot be joined with the acts of other mining companies to create a cause of action against the defendant."

But the court, upon a review of the authorities, found this last position untenable. Reference was made to the case of

Hillman v. Newington, 57 Cal. 62, and it was said: "This case clearly recognizes the equitable principle that, in an action to abate a public or private nuisance, all persons engaged in the commission of the wrongful acts which constitute the nuisance may be enjoined jointly or severally. It is the nuisance itself which, if destructive of public or private rights of property, may be enjoined." The court continued: "But it is also claimed that the defendant has acquired the right from custom, and by prescription and the statute of limitations, to use the American and Sacramento rivers as outlets for its mining *debris*; and that, in the exercise of this right, it cannot be restrained in its business of hydraulic mining, notwithstanding the consequent injuries to those rivers. Undoubtedly the fact must be recognized that in the mining regions of the state the custom of making use of the waters of streams as outlets for mining *debris* has prevailed for many years; and, as a custom, it may be conceded to have been founded in necessity, for without it hydraulic mining could not have been economically operated. In that custom the people of the state have silently acquiesced, and, upon the strength of it, mining operations, involving the investment and expenditure of large capital, have grown into a legitimate business, entitled, equally with all other business pursuits in the state, to the protection of the law. But a legitimate private business, founded upon a local custom, may grow into a force to threaten the safety of the people, and destruction to public and private rights; and, when it develops into that condition, the custom upon which it is founded becomes unreasonable, because dangerous to public and private rights, and cannot be invoked to justify the continuance of the business in an unlawful manner. Every business has its laws, and these require of those who are engaged in it to so conduct it as that it shall not violate the rights that belong to others. Accompanying the ownership of every species of property is the corresponding duty to so use it

as that it shall not abuse the rights of other recognized owners. \* \* \* As to the claim of right derived from prescription and the statute of limitations, it is sufficient to say that the right to continue a public nuisance cannot be acquired by prescription, nor can it be legalized by lapse of time. Against it, however long continued, the state is bound to protect the people; and for that purpose the attorney general, as the law officer of the state, has the power to institute a proceeding in equity, in the name of the people, to compel the discontinuance of the acts which constitute the nuisance."<sup>1</sup>

In a later case it was held that a corporation may be enjoined upon an *ex parte* application, without notice to it, from depositing in or discharging mining *debris* into certain streams, or from selling water to others to be used for the purpose of washing, by the hydraulic process, any mineral lands into the channel of said streams or their tributaries, though the general, ordinary, and only business of such corporation is that of mining by the hydraulic process, or of selling water to others to be used for like purposes.<sup>2</sup>

#### § 84. Impounding dams.

[The hydraulic mining companies, after the decisions referred to in the preceding section, began the erection of impounding dams across the streams utilized by them, for the purpose of arresting the progress of the *debris* into the rivers below. Some discussion has arisen in regard to the sufficiency of these dams, but the courts have not yet formulated a definite rule on the subject. Keeping in mind, however, the extent of the public

<sup>1</sup>Citing *Pettis v. Johnson*, 56 Ind. 139; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *Wright v. Moore*, 38 Ala. 593; *People v. Cunningham*, 1 Denio, 524; *Mills v. Hall*, 9 Wend. 815; *Civil Code Cal.* § 3490; *Sacramento v. Central*

*Pac. R. R.*, 61 Cal. 250; *People v. Stratton*, 25 Cal. 242; *Yolo Co. v. Sacramento*, 36 Cal. 193.

<sup>2</sup>*Eureka Lake & Yuba Canal Co. v. Superior Court*, 66 Cal. 311, 5 *Pac. Rep.* 490.

and private interests which are jeopardized by the system of hydraulic mining, they have held that no dam for impounding mining *debris*, erected in a mountain river, should be held sufficient to protect riparian and other proprietors below, upon any evidence not of the most unquestionable and satisfactory character. "It is for the pecuniary interest of hydraulic miners," says Judge Sawyer, "to get out as much of the precious metals as possible, with the least possible expense. The interests of the moving party in this matter are simply to tide over the present, and escape injunctions until its mines can be worked out. What happens afterwards is no concern of its. As human nature is constituted, the action of parties so situated, set in motion by an application of the coercive powers of the law, in the erection, at their own expense, and according to their own ideas, of impounding dams for the sole protection of the rights of those upon whom they commit trespasses, should be scrutinized with jealous care by those who administer the laws, and whose imperative duty it is to see that each man shall so use his own as not to injure his neighbor. It may well be doubted whether any restraining dam, however constructed, across the channels of the main mountain rivers, of a torrential character, should be accepted by the courts as a sufficient protection to the occupants of land in the valleys below liable to be injured. But, if any are to be accepted, they should only be those the ample sufficiency of which has been established upon testimony of the most unquestionable and satisfactory character. Nothing should be left to conjecture. This is not a matter of a single dam. A rule must be laid down applicable to the entire gold-bearing region. It will be no use to restrain one mine, if others are allowed to run. Besides, it would be unjust. All doing injury must be stopped or restrained from contributing to further injury, or none."<sup>1</sup>]

<sup>1</sup>Hardt v. Liberty Hill Min. Co., 27 Fed. Rep. 788.



The question of the sufficiency of these impounding works has again come before the federal courts in certain cases to which we shall here briefly refer. In one, application was made, on behalf of the United States, for an injunction to restrain the hydraulic mining operations of the North Bloomfield Gravel Mining Co.,—the same company which had previously been enjoined. But it was satisfactorily shown to the court that the defendant had caused to be erected extensive works, by means of which it effectively impounded upon its own land, and within its own mine, all materials likely to injure the navigation of the streams. And it was held that the injunction should be denied.<sup>1</sup> In the other case,<sup>2</sup> however, it was shown that the dam constructed in connection with the impounding works was of wood, standing in the bed of a torrential mountain stream, and of necessity liable to be carried away by freshets, so as to discharge all the impounded *debris* into the streams, thereby causing great damage to navigation. And it was considered that the injunction should be granted. Mr. Circuit Judge Gilbert indicated the determining considerations in this case in the following language: "In deciding whether a mining operation conducted with this kind of an impounding device should be restrained by the court, I am moved, not so much by consideration of the question whether or not the mining *debris* has been successfully impounded by the defendants heretofore, as by the probability of its escape from the impounding pool, and its consequent injury to the navigability of the lower streams in the future. The dam in question appears from the evidence to be strong and well built. It is doubtless capable of sustaining great pressure. It is a wooden dam, however, and

<sup>1</sup>United States v. North Bloomfield Gravel Min. Co., 53 Fed. Rep. 625.

<sup>2</sup>United States v. Lawrence, 53 Fed. Rep. 632.

it stands in the bed of a torrential stream. It necessarily follows that it is liable to be carried away by freshets. The same forces that have broken similar dams heretofore are liable at any time to destroy this dam; and, if it should be thus destroyed, no one can doubt that all the mining *debris* now impounded above the dam would by the same destructive force be carried into the streams below."

### III. EXTENT OF THE RIGHT ACQUIRED.

#### § 85. Amount of water which the appropriator is entitled to use.

The amount of water which an appropriator is entitled to use—commonly designated as the *extent* of his appropriation—is a question of fact to be determined by a jury. The right of the prior appropriator in this respect is limited to the amount or extent of his actual appropriation, as against subsequent appropriators and claimants; and he cannot, after *their* subsequent rights have attached, by changing the place or nature of his use, or by enlarging his works, or otherwise, extend his claim, or increase the amount of water diverted or used, to the prejudice of such subsequent parties.<sup>1</sup> The extent of the appropriation and amount of water thereby taken may be determined by the special purpose for which the appropriation was made; and in such a case the appropriator is entitled to so much water only as is necessary for that purpose; a change of the purpose which would increase the amount of water diverted would not be permitted as against subsequent claimants.<sup>2</sup> Thus, in the case of Nevada

<sup>1</sup>Nevada W. Co. v. Powell, 34 Cal. 109; Ortman v. Dixon, 13 Cal. 33; Higgins v. Barker, 42 Cal. 233; Davis v. Gale, 32 Cal. 26; Lobdell v. Simpson, 3 Nev. 274; Barnes v. Sabron, 10 Nev. 217; Atchison v. Peterson, 20 Wall. 514.

<sup>2</sup>Nevada W. Co. v. Powell, 34 Cal. 109; McKinney v. Smith, 21 Cal. 374; Barnes v. Sabron, 10 Nev. 217. [See, also, Stowell v. Johnson, (Utah) 26 Pac. Rep. 290; Quigley v. Birdseye, 11 Mont. 439, 28 Pac. Rep. 741. In determining

W. Co. v. Powell, cited below, it was held that where the plaintiff had appropriated a portion of the water of a stream, and had made a dam and ditch amply sufficient for his purpose, and had thereby acquired the right to use such portion only of the water, and in such manner only, he cannot encroach upon the rights of subsequent appropriators by extending his use beyond the first appropriation. By the plaintiff's erections and use for several years, other persons had a right to suppose that he had thereby defined and determined his own rights as to amount of water, and to act accordingly by appropriating the surplus to their own uses. On the other hand, if a prior appropriation has been made of a certain amount or quantity of the water, independently of any *particular* use or purpose, the appropriator may afterwards, as against subsequent claimants, change either the place or the nature of his use, provided such change does not increase the amount of water diverted and used.<sup>1</sup>

the amount of water appropriated for useful or beneficial purposes, the number of acres of land claimed or owned by each party, and the amount of water necessary to the proper irrigation of the same, should be taken into consideration. Kirk v. Bartholomew, (Idaho,) 29 Pac. Rep. 40. The sale by plaintiffs of a part of the water claimed by prior appropriation does not show that they attempted to appropriate more than they needed, where it appears that all the water of the streams was not sufficient to irrigate their land. Drake v. Earhart, (Idaho,) 23 Pac. Rep. 541.]

<sup>1</sup>Davis v. Gale, 32 Cal. 26; Kidd v. Laird, 15 Cal. 161; Woolman v. Garringer, 1 Mont. 535. [Where a party has appropriated water for

the purpose of irrigation, the amount of water to which he is entitled, as against subsequent appropriators, is limited to the amount actually applied to the purposes of irrigation. Simpson v. Williams, 18 Nev. 432, s. c. 4 Pac. Rep. 1213. The grantee of an undivided half of a sufficiency of water for a certain purpose takes by his grant no more than one-half of the whole quantity of water in the stream, whenever such quantity is, by natural causes, diminished below such sufficiency. Dow v. Edes, 58 N. H. 193. The diversion of water from a natural stream, on the part of one who has conducted some water to it, will be restrained at the suit of a riparian proprietor, unless the former shows that he has not diverted

**§ 86. Carrying capacity of ditch.**

Where the prior appropriation extends to all the water flowing in the stream at the point of diversion, the appropriator may enlarge his ditch at pleasure, and so increase the amount actually diverted, and other parties whose claims to the stream are subsequent cannot complain of such enlargement."<sup>1</sup> Where the prior appropriation extends only to a portion of the stream, and is determined by the amount actually diverted, the measure of such appropriation and of the appropriator's right seems to be the quantity of water which could actually be carried by his ditch in the size and condition in which it was when the subsequent appropriation above him on the stream was made. The rule under these circumstances is thus stated by the supreme court of California: "He is entitled to have the water [of the stream flowing down to his ditch] undiminished in quantity, so as to leave sufficient *to fill his ditch* as it existed at the time the subsequent appropriations above him were made."<sup>2</sup> The supreme court of Nevada has formulated the rule in somewhat more precise terms: "It seems that the quantity of water appropriated is to be measured by the capacity of the ditch or flume

from it more water than he led to it. *Wilcox v. Hausch*, 64 Cal. 461, s. c. 3 Pac. Rep. 108. The prior appropriator of water has the prior right to its use to the extent, in amount and time, of his first appropriation, and (it seems) to the extent to which he was preparing to use it. *Lehi Irrigation Co. v. Moyle*, 4 Utah, 327, 9 Pac. Rep. 867. A decree enjoining an appropriator of water against diverting from a stream any greater quantity of water than will flow through an iron pipe of a certain size, which is found to be the amount required by him, is erroneous, where the water is conducted in

an open ditch or flume, as in such case the amount which reaches the place of use is not the same as that diverted, and the appropriator is entitled to such an amount, allowing for waste, as will yield the amount required at the place of use, and he is not obliged to substitute iron pipes. *Barrows v. Fox*, (Cal.) 32 Pac. Rep. 811.]

<sup>1</sup>*James v. Williams*, 31 Cal. 211. In *Feliz v. City of Los Angeles*, 58 Cal. 73, it was held that the city had acquired a right to all the water of a river, and that plaintiff's use was permissive, not adverse.

<sup>2</sup>*Bear River, etc., Co. v. New York M. Co.*, 8 Cal. 327.

at its smallest point; that is, at the point where the least water can be carried through it."<sup>1</sup>

**§ 87. True capacity of ditch the proper measure.**

It may well be doubted, I think, whether there is any material difference between these two modes of expressing the rule. But the *actual* physical condition of the ditch at the time the use of the water by its means began, and during some period of time after such commencement, and the amount of water *actually* diverted and carried by it at and during these times, do not always furnish an inflexible test or measure of the extent of the appropriator's right. The ditch might be so imperfectly constructed, with irregular and improper grades, and with incomplete excavation, that it could not actually carry so large an amount of water as its general plan and size rendered it capable of carrying, and as its proprietor had intended to appropriate. Under these circumstances, unless the use of the ditch had continued so long a time as to show an intention of the appropriator to adopt it in its existing imperfect condition, the proprietor would be entitled to perfect his ditch by removing obstructions, improving the grades, and the like, so that it could actually carry the amount of water indicated by its general size and character, and originally intended to be appropriated; and the increase in the actual flow of water thus caused would not be an invasion of the rights of subsequent appropriators, although their rights

<sup>1</sup> Ophir Silver M. Co. v. Carpenter, 6 Nev. 393; 4 Nev. 534. Also in Barnes v. Sabron, 10 Nev. 217, the court held that where the prior appropriator of a stream has constructed ditches in order to irrigate his land, if the capacity of his ditches is greater than is necessary to irrigate his farming land, he must be restricted to the quantity needed for the purposes of irrigation, of watering his stock, and of

domestic uses; but if the capacity of his ditches is not more than sufficient for those purposes, then, under the facts of this case, no change having been made in the ditches since their construction, and no question as to the right of their enlargement being involved, he must be restricted to the capacity of his ditches at their smallest point.

accrued before the improvements were made. The case of *White v. Todd's Valley W. Co.*<sup>1</sup> arose out of such circumstances. The defendants had made a ditch for mining purposes; and the plaintiff afterwards made a ditch, taking water from the same stream. The plaintiff complained because the defendants had enlarged their ditch, after the plaintiff's appropriation, and had thereby caused a diversion of a greater amount of water, to the plaintiff's injury, and prayed for an injunction. The court held that the defendants were not restricted to the amount of water *actually* taken by their ditch at the very beginning of its use, unless by its general plan, size, and grade it was not capable of carrying more water than was then actually taken by it. If by reason of obstructions in the ditch, or irregularity of its grade at that time, it was not capable at first of taking so much water as its general plan and size would indicate, the defendants would have a reasonable time within which to remove such obstructions or to adjust the grades, and could then divert the water to the full capacity of the ditch. But if the defendants continued to take only the original quantity of water long enough to indicate an intent to divert *only that amount*, or if they delayed for an unreasonable time to remove the obstructions or regulate the grades, then they would be restricted to the amount thus actually taken at first, and the plaintiff would be entitled to all the residue. The rule laid down by this decision is plainly confined, in its scope and operation, to the very special circumstances above described; it can hardly be regarded as furnishing any *general* test or measure of the amount included in a prior appropriation. [In Montana, it is ruled that the measure of the appropriator's right to water is the number of inches that his ditch would convey from the point of diversion without running over its banks.<sup>2</sup> And in a later case in that court, it was considered that an instruction that the

<sup>1</sup> 8 Cal. 443.<sup>2</sup> *Caruthers v. Pemberton*, 1 Mont. 111.

extent of the appropriation of water was determined by the capacity of plaintiff's "head-gate and ditches and the quantity of water required" by him, to be measured as the statute directs, was not erroneous in making the test the head-gate, instead of what the ditch would carry.<sup>1</sup> In California, it is said that evidence of the width and depth of the appropriator's ditch is insufficient to show its carrying capacity, in the absence of any evidence as to the velocity of the water or the grade of the ditch.<sup>2</sup>] A few other cases, which deal only with questions of fact as to the amount of water appropriated, are cited in the foot-note.<sup>3</sup>

### § 88. Measurement of water.

[The unit for the measurement of water, established by statute in several of the Pacific states and territories and recognized and employed in all, is the "inch." By this term is meant the volume of water which would be discharged from an aperture one inch square under a given head or pressure. But the theoretical discharge from such an orifice is greater than the experimental discharge, the two standing in a ratio to each other of about ten to six. It follows that in any controversy involving the extent of the rights of an appropriator or ditch owner, as measured in inches of water, it will be necessary to determine whether the amount is to be understood as the actual or theoretical flow from an aperture of the given dimensions under the designated head. And this will depend upon whether or not the word "inch" has acquired a well-defined technical meaning. The judicial decisions upon this question are exceedingly few, and cannot be said, as yet, to have determined the rule finally and conclusively. In an important

<sup>1</sup>Carron v. Wood, 10 Mont. 500, 26 Pac. Rep. 388.

<sup>2</sup>Last Chance Water Co. v. Heilbron, 86 Cal. 1, 26 Pac. Rep. 528.

<sup>3</sup>Higgins v. Barker, 42 Cal. 233;

Reynolds v. Hosmer, 51 Cal. 205; Dougherty v. Haggin, 61 Cal. 305; Stein Canal Co. v. Kern Island Co., 53 Cal. 563.

case recently decided in Wisconsin, the court was asked to rule that the term "square inch of water" had a clear and well-defined technical meaning, and that it meant a stream of water with a cross-section area of one square inch, moving with the velocity due to a given head. But the court held that, at any rate, the term had no such technical meaning in the year 1860, when the grant in question was made, and therefore that evidence was admissible of the circumstances surrounding the making of the grant, as showing the signification which the parties intended to attach to the term used.<sup>1</sup> In the case at bar it appeared that the owner of a canal and water-power had granted to another person the right to draw and use "2,000 inches of water under an 11-foot head." The apertures constructed by the grantee in the flume leading to his mill, and which were used for a number of years, aggregated in superficial area 1,980 square inches. The water discharged from an aperture of 2,000 square inches would have been 62 per cent. of the theoretical discharge due to a stream having a cross-section of like area and moving at the velocity due to the stated head. The theoretical discharge would have almost equalled the capacity of the canal. It was held that the preparation of the openings with a superficial area within a few inches of the grant was a controlling circumstance in determining its construction, and the grantee had a right to as much water as would, under a head of 11 feet, flow through a simple orifice of 2,000 square inches area in the side of a flume.<sup>2</sup> In the decisions to which we have here referred, the learned court admitted that "the testimony shows that the tendency among wheel vendors and mill men for some years has been and is to attach to the term 'inch of water' the meaning of the theoretical inch;" but

<sup>1</sup>Janesville Cotton Mills v. Ford, (Wis.) 52 N. W. Rep. 764; Jackson Milling Co. v. Chandos, (Wis.) Id. 759.

<sup>2</sup>Jackson Milling Co. v. Chandos, *supra*.



it was stated that "it does not appear that such theoretical arbitrary meaning has yet crystallized so as to be controlling, like the meaning of the term 'foot of lumber,' or other arbitrary terms which are known and recognized without dispute." And in another place it was said that if the question had related solely to deeds executed within the last decade, the argument in favor of attaching to the disputed term the meaning of a theoretical inch would have been much stronger.

So far as regards the Pacific states, we do not find that the courts have as yet passed upon this exact question. But we understand that the general and well-recognized usage of those communities attaches to the phrase "inch of water" the meaning of the *practical* inch, as determined by actual measurement of the water, that is, the volume of water actually discharged from an aperture having a superficial area equal to the given number of inches, under a constant head, which latter is determined either by being specified by the parties, by local usage, or, in some states, by statutory regulation. And we apprehend that the courts will rule in accordance with this understanding and usage, when called upon to determine the question, unless, in the particular case, there should be satisfactory evidence that the parties concerned intended to use the term in a different signification.<sup>1]</sup>

<sup>1</sup>In a controversy concerning water-rights, the findings should state the quantity of water the plaintiff is entitled to have flow past the defendant's ditch in inches or gallons, and not merely by fixing the width, depth, and grade of the ditch. *Lakeside Ditch Co. v. Crane*, 80 Cal. 181, 22 Pac. Rep. 76. Where plaintiff claims 600

inches of water in a stream by prior appropriation, and it appears that there were but 150 inches therein, failure to find under what pressure the water is measured is not prejudicial to defendant, who claims as riparian owner. *Drake v. Earhart*, (Idaho,) 23 Pac. Rep. 541.

## IV. SUCCESSIVE APPROPRIATORS.

## § 89. Rights of subsequent appropriator.

In the previous sections, which particularly describe the mode of effecting a prior appropriation, the rights of the prior appropriator, and the amount of water included within a prior appropriation, the relations of the subsequent appropriators, and especially the limitations or restrictions upon their rights growing out of the superior claims of the prior appropriator, have necessarily been involved and stated. I shall not repeat the discussions of these previous sections, and reference must be made to them in order to obtain a full view of the relations subsisting between the prior and the subsequent appropriators, and the limitations placed upon the rights which can be acquired by the latter parties. In the present section I purpose to describe the *affirmative* rights, which may be obtained and held by subsequent and successive appropriators, to divert and use the waters of a public stream which have already been appropriated by the prior acts of another party.

## § 90. Successive appropriations.

Whenever a certain person, A., has made a prior appropriation at a certain point on a stream, even though of the whole amount of water, it has already been shown that another party, B., may make a subsequent appropriation at a place higher up on the stream, may divert and use the waters, and return them, undeteriorated in quality and undiminished in quantity, into the natural channel of the stream above the head of A.'s ditch, and no right of A.'s would thereby be infringed, because his use of the water would not be in any way interfered with.<sup>1</sup> This particular case is simply an instance of the following general

<sup>1</sup>See *ante*, § 55.

doctrine, which has been firmly settled by numerous decisions:

A prior appropriation having been made on a public stream, the residue or surplus remaining of its waters, not embraced within the amount of such prior appropriation, may afterwards be appropriated, either above or below on the same stream, by other parties, if no interference with the rights of the prior appropriator is thereby caused. The doctrine extends to and admits of a succession of such appropriators; and there is no limit to its operation, except such physical limits as arise from the size of the stream itself and the amount taken by each claimant. Among the successive appropriators, each is in the position of a prior one towards all who are subsequent to himself.<sup>1</sup> This general doctrine has been stated in the following modes by different decisions: "In controversies between prior and subsequent appropriators of water, the question is, has the use and enjoyment of the water, *for the purposes for which the first appropriator claims it*, been impaired by acts of the subsequent claimant?"<sup>2</sup> A decree prohibiting a party situated on a stream below the dam at the head of a ditch belonging to another person from diverting or interfering with the water *above* such dam, does not hinder him from using the surplus water which flows down the stream after the ditch is supplied.<sup>3</sup> The surplus water of a stream, after a prior appropriation, may be the subject of a new appropriation, and the second appropriator will have a paramount right to use all the waters which are not required for the special

<sup>1</sup> Stein Canal Co. v. Kern Island, etc., Co., 53 Cal. 563; Broder v. Natoma W. Co., 50 Cal. 621; Smith v. O'Hara, 43 Cal. 371; Higgins v. Barker, 42 Cal. 233; Nevada W. Co. v. Powell, 34 Cal. 109; Davis v. Gale, 32 Cal. 26; Hill v. Smith, 27 Cal. 476; American Co. v. Bradford, Id. 361; McKinney v. Smith, 21 Cal. 374; Ortman v. Dixon, 18

Cal. 33; Butte C. Co. v. Vaughn, 11 Cal. 143; Kelly v. Natoma W. Co., 6 Cal. 105; Lobdell v. Simpson, 2 Nev. 274; Proctor v. Jennings, 6 Nev. 83; Barnes v. Sabron, 10 Nev. 217.

<sup>2</sup> Hill v. Smith, 27 Cal. 476.

<sup>3</sup> American Co. v. Bradford, 27 Cal. 361.

purposes of the prior appropriator.<sup>1</sup> If a prior appropriator of water for mill purposes suffers a portion of the water, or the whole amount of it, after driving the mill, to flow down its accustomed channel, other parties below him on the stream may appropriate this residuum, so as to obtain a vested right to its use.<sup>2</sup> In *Lobdell v. Simpson*<sup>3</sup> the doctrine was briefly but comprehensively stated: "A second appropriator has a right to have the water continue to flow as it flowed when he made his appropriation." The same court said, in *Proctor v. Jennings*:<sup>4</sup> "A person appropriating a water right on a stream already appropriated acquires a right to the surplus or residuum which he appropriates; and those who hold the prior rights, whether above or below him on the stream, can in no way change or extend their use of the water to his prejudice, but are limited to the rights enjoyed by them when he secured his own." [An injunction will not be granted to restrain one from taking and appropriating water from a creek, for irrigating purposes, on a bill by a prior appropriator of the waters of the creek, below defendant, where it appears that there was enough water for both parties.<sup>5</sup> So where one is adjudged the owner of all of certain water and water rights, except an amount "equal to a constant flow of  $2\frac{1}{3}$  inches of water, measured under a four-inch pressure," adjudged to belong to defendants, the latter cannot use more than such  $2\frac{1}{3}$  inches at any time, though they afterwards seek to compensate for such excessive use by refraining from using any water whatever.<sup>6</sup> Again, where it is adjudged that plaintiffs are entitled to a certain amount of water from a stream, and that defendants are entitled to the

<sup>1</sup>*McKinney v. Smith*, 21 Cal. 374.

<sup>2</sup>*Ortman v. Dixon*, 13 Cal. 33.

<sup>3</sup>2 Nev. 274.

<sup>4</sup>6 Nev. 83.

<sup>5</sup>*Clough v. Wing*, (Ariz.) 17 Pac. Rep. 453.

<sup>6</sup>*Alhambra Addition Water Co. v. Richardson*, 95 Cal. 490, 30 Pac. Rep. 577.

balance, and it appears that plaintiffs have always used the water by means of a defective flume, the court may direct them to carry the water to which they are entitled by flume and pipe, so that the balance may not be wasted.<sup>1</sup> But it has been held that where the plaintiff constructs and maintains a dam in a stream on public lands, for the purpose of supplying a canal with water to be used for beneficial purposes, he acquires a possessory interest in the dam, the pond formed by it, and the land under the pond, and other persons may be enjoined from extending a canal into the pond, even though their intention was to take only the surplus water after plaintiff's canal had taken its supply.<sup>2]</sup>

### § 91. Periodical appropriations.

It makes no difference in the application of this doctrine how the surplus or residue of the water may arise. It may be constant, resulting from an appropriation of a portion only of the water; or it may be intermittent, resulting from an appropriation of all the water during only a part of the time. If a prior appropriation is of such a character that it only takes and uses the water on certain days of the week or month, a second appropriator may acquire a vested and paramount right to the same amount of the water flowing through the stream on the other days not embraced in the prior claim. A. having appropriated the entire water of a stream to be used only on Mondays, Tuesdays, and Wednesdays, B. may subsequently acquire an equally perfect right to use the same quantity of the water on Thursdays, Fridays, and Saturdays.<sup>3</sup> This rule is stated in the

<sup>1</sup>Barrows v. Fox, (Cal.) 30 Pac. Rep. 768.

<sup>2</sup>Natoma Water Co. v. Hancock, (Cal.) 31 Pac. Rep. 112.

<sup>3</sup>Smith v. O'Hara, 43 Cal. 371;

Barnes v. Sabron, 10 Nev. 217; and see Lytle Creek W. Co. v. Perdew, 2 Pac. Rep. 732. [Where a landowner appropriates and uses all the water of a stream, except dur-

Nevada case in the most general terms: "If the first appropriator only appropriates a part of the waters of a stream for a certain period of time, any other person may not only appropriate a part or the whole of the residue, and acquire a right thereto as perfect as that of the first appropriator, but he may also acquire a right to the quantity of water used by the first appropriator at such times as it is not needed or used by him."

**§ 92. Conditions under which subsequent appropriation may be effected.**

The rights of the subsequent appropriator conferred and protected by this doctrine may exist and be exercised under the following different conditions of fact: (1) A subsequent appropriator may always take and use *any* amount of water at a place higher up the stream than the point of the prior appropriation, and without any reference to the amount embraced in such prior appropriation, provided he returns all the water after its use, undeteriorated in quality, to its natural channel in the stream, before it reaches the prior appropriator's place of diversion,—the head of his ditch; since under these circumstances the prior appropriator is in no manner injured. (2) When a prior appropriation includes only a certain portion of the water flowing in a stream,—measured, for example, by the capacity of the ditch,—a subsequent appropriator, at a place higher up on the stream, may always take from the stream, use, and consume, without returning, any quantity of its water, provided he leaves flowing down the natural channel after his own diversion a sufficient amount of the water at all times to meet the demands of the prior appropriation; in other words, so as not to lessen nor interfere with the amount which the prior appropriator is en-

ing extraordinary high water or freshets, he cannot obtain an injunction against appropriation by

another of the surplus water during freshets. *Edgar v. Stevenson*, 70 Cal. 286, 11 Pac. Rep. 704.]

titled to draw off by his means of diversion. (3) When a prior appropriator takes and uses the whole or any portion of the water of a stream, for milling or other similar purposes, by which the water is not consumed, and then after such use returns the water to the stream so that it thenceforth flows down its natural channel, a subsequent appropriator lower down the stream may appropriate and obtain a vested right to the whole or any part of the same water so discharged and flowing down the natural channel after its former use. [If the lower appropriator has appropriated only the water which the upper appropriator allows to pass, the lower appropriator does not acquire a right, as against the upper appropriator, to a supply of water sufficient to fill his ditch.<sup>1</sup> Where the water in the ditch is more than sufficient for the wants of the upper proprietor, and greater in amount than he has appropriated, the lower proprietor is entitled to the flow of the surplus; but in a season of drought, during which the flow of the water is greatly diminished, the lower proprietor is not entitled to enjoin the upper proprietor from using such an amount of the water as is within his original appropriation, though such use leaves little or no surplus for the lower proprietor.<sup>2</sup>] (4) When a prior appropriator takes and uses a certain portion or quantity of the water from a stream, and by the nature of his use consumes the same without restoring it or any part of it to the stream, then the surplus or residue of the stream not so diverted but continuing to flow down the natural channel, or any part thereof, may be subsequently appropriated by another party lower down the stream, and his rights of appropriation in such surplus or residue will be vested and perfect. (5) In all these conditions, a subsequent appropriator may appropriate and obtain a vested right to use

<sup>1</sup>Lakeside Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. Rep. 76.

<sup>2</sup>Simmons v. Winters, 21 Oreg. 35, 27 Pac. Rep. 7.

the water during the fixed intervals of time when it is not taken and used by the prior appropriation. All the possible cases which can arise may be accounted for and explained by a combination among the foregoing general conditions of fact. Whenever successive appropriations have been properly and lawfully made on the same stream, each party is, with respect to the extent of his appropriation,—the amount included therein,—in the legal position of a prior appropriator towards all the others.<sup>1</sup> [In Colorado, the constitution provides that “priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the service of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming for any other purpose.” But it is held that this does not authorize an interference with the rights of prior appropriators for irrigation purposes, vested before the adoption of the constitution, in order to supply water for domestic purposes to later comers.<sup>2</sup> Where, by common consent, a municipality has for many years regulated the appropriation of the waters of a certain river for irrigation purposes, by allowing a *pro rata* distribution among the appropriators in case of deficiency, it has no right subsequently to divide the appropriators into two classes, according as their use began before or after a certain arbitrary date, and to restrict only those of the second class; but all must be served alike.<sup>3</sup>]

<sup>1</sup>[Where old ditches are superseded by agreement by a new one, and nothing is said in regard to the division of the water, the rights of the parties are to be determined according to their original appropriations, and not according to their interests in the new ditch.

Rominger v. Squires, 9 Colo. 327, 12 Pac. Rep. 213.]

<sup>2</sup>Armstrong v. Larimer Co. Ditch Co., 1 Colo. App. 49, 27 Pac. Rep. 235.

<sup>3</sup>Holman v. Pleasant Grove City, (Utah,) 30 Pac. Rep. 72.



**§ 93. Division of increase in stream.**

In addition to the general doctrine thus stated and illustrated, the following special rules, applying to particular circumstances, have been the subject-matter of decision. If two persons successively appropriate water of a stream by means of their ditches, and a third person turns into the same stream, at a place higher up than the heads of both these ditches, additional water brought by means of his own ditch from another and different stream, without any intention of recapturing the same, the water thus discharged becomes *publici juris*,—to all intents a part of the natural waters of the stream into which it is emptied; and it belongs to the two appropriators according to their priority of right,—the one having made the prior appropriation is first entitled to the increased flow to the extent of his appropriation.<sup>1</sup>

A person who had located a mill-site on a stream, and appropriated the water for the purposes of his mill, sold and conveyed all his interest in the water of the stream to the proprietor of a ditch above him. Held, that he had not thereby lost his prior right to the water which still flowed down the stream after such sale, as against a third party who had appropriated the water below him subsequently to his original appropriation, but before his said sale and conveyance.<sup>2</sup>

**§ 94. Wrongful diversion of springs.**

In the case of *Strait v. Brown*<sup>3</sup> the supreme court of Nevada decided a point which may be of much practical importance. Although no distinction, in general, exists between waters running under the surface in defined channels, and those running in such channels upon the surface; and although water percolating through the ground below the surface is not governed by

<sup>1</sup> *Davis v. Gale*, 32 Cal. 26.

<sup>2</sup> *McDonald v. Askew*, 29 Cal. 200.

<sup>3</sup> 16 Nev. 317.

the same rules which pertain to running streams,—still, subsequent appropriators cannot, as against the prior appropriator of the same stream, lawfully acquire rights to the waters of the *springs* which constitute the source of such stream, simply because the means through which the waters are conveyed from the springs to the stream are subterranean, and not well understood nor defined. In other words, the subsequent appropriators on a stream cannot cut off and destroy or impair the rights of the prior appropriators by tapping the very springs themselves which constitute the sources of the stream, under color of a right to reach subterranean and percolating waters.<sup>1</sup> [Where a stream, from time immemorial, has flowed through plaintiff's land in a perceptible current and in a well-defined channel, his right to have such flow continued is not affected by the fact that the source of the stream is a spring on defendant's land.<sup>2</sup> But the supreme court of California, in a recent case, has decided that the fact that a person has appropriated water from a stream fed by a spring on another's land cannot prevent the owner of the land from digging trenches for a useful purpose, and thereby diverting the percolating waters which supply the spring.<sup>3</sup>]

### § 95. Right to tributaries of stream.

[In the case of a natural water-course fed by tributary streams, the appropriator of water from the main stream must be regarded as vested with the right to control the tributaries to the extent of his appropriation. That is to

<sup>1</sup>For further special applications, see *Nevada W. Co. v. Powell*, 34 Cal. 109; *Reynolds v. Hosmer*, 51 Cal. 205. The particular facts and rulings in these cases have been sufficiently described under previous sections. See, also, *Leonard*

*v. Shatzer*, 11 Mont. 422, 28 Pac. Rep. 457.

<sup>2</sup>*Chauvet v. Hill*, 93 Cal. 407, 28 Pac. Rep. 1066.

<sup>3</sup>*Southern Pac. R. Co. v. Du-four*, 95 Cal. 615, 30 Pac. Rep. 783.

say, if he has acquired the right to divert and use *all* the water of the main stream, no other persons can subsequently appropriate the waters of the tributaries, except upon the condition that they return the whole of the water taken, not diminished in volume and not deteriorated in quality, before it reaches the place of the prior appropriator's diversion. And if he has appropriated a *part* of the water of the main stream, any subsequent appropriations from the tributaries must be subject to the condition that the flow of water in the main stream be not thereby diminished below the extent of the prior appropriation.<sup>1</sup> Thus, in Idaho, it is said that prior appropriation of all the waters of a stream, applied to a useful purpose, gives the better right to the tributaries and all the direct and immediate sources of supply of the stream, and when this right once vests, it must be protected and upheld. Rights cannot be acquired to the waters of springs situated along the channel of the stream, and which constitute its direct source of supply, by entering upon and cleaning out the same, and thereby increasing the water-supply, as against prior appropriation in good faith of the whole of the waters of the stream.<sup>2</sup> In a case in Utah, the action being brought to establish a right to all the waters of a certain creek, it appeared that it was fed by two tributaries which furnished about one-third of the water. Plaintiff's grantors had not appropriated all of the waters of the creek prior to the appropriation by defendant's grantors of nearly all the waters of the tributaries, and the water appropriated by defendant ran off his land into the creek, so that its flow was not materially lessened during part of the irrigation season. It was held that plaintiff was entitled only to the amount of water appropriated by his grantors,

<sup>1</sup> Strickler v. City of Colorado Springs, 16 Colo. 61, 26 Pac. Rep. 313.

<sup>2</sup> Malad Val. Irr. Co. v. Campbell, (Idaho,) 18 Pac. Rep. 52.

and a judgment for plaintiff, reserving undefined rights to defendant in the waters of the tributaries, was erroneous.<sup>1</sup>]

## V. ABANDONMENT OF RIGHT.

### § 96. General doctrine of abandonment.

Many of the cases heretofore cited, and several of the rules formulated in the foregoing sections, recognize the fact that there may be an abandonment of the exclusive right to divert and use water acquired by or resulting from a prior appropriation; that such an abandonment may be made either after the prior appropriation has become perfect and complete, and the right under it vested, or while it is yet imperfect and incomplete, and the right under it remains inchoate; and, finally, that an abandonment may be express and immediate, by the intentional act of the appropriator, or may be implied from his neglect, failure to use due diligence in the construction of his works, non-user of them after completion, and the like. The general doctrine concerning the effect of such an abandonment, at whatever time or in whatever manner made, is well settled. The prior appropriator thereby loses all of his exclusive rights to take or use the water which he had acquired, or might have acquired, by his appropriation; and he cannot, after an abandonment, reassert his original right to the same, or the same amount of water, as against a second or other subsequent claimant who has taken proper steps to effect an appropriation thereof. If there has been no subsequent appropriation of the water thus abandoned, by another party, the prior appropriator may, of course, regain his former right, but this can only be done by his properly commencing and completing *de novo* the requisite steps in order to effect an appropriation, as heretofore described. He is in ex-

<sup>1</sup>Salina Creek Irr. Co. v. Salina Stock Co., (Utah,) 27 Pac. Rep. 578.  
(178)

actly the same situation as though he had hitherto made no attempt to appropriate the water.<sup>1</sup>

### § 97. Methods of abandonment.

The methods in which an abandonment may be accomplished are various. Since the right held by the appropriator is an interest in land, an incorporeal hereditament, it can only be transferred, as has already been shown, by an instrument in writing sufficient to convey real estate. It follows that a mere verbal sale and transfer of his water right by a prior appropriator operates *ipso facto* as an abandonment thereof.<sup>2</sup> Such act shows an unequivocal intent on the part of the appropriator to give up and relinquish all of his interest, and, as it does not effect any transfer thereof to the attempted assignee or vendee, the only possible result is an immediate and complete abandonment. The same result follows from an attempted transfer of the water right by means of an imperfect deed or instrument of conveyance.<sup>3</sup> [But it is held that the grant of a ditch and water right to an *alien* is not an abandonment by the owner, but the alien may hold the same, until forfeited by office found, against collateral attacks by third persons, other than the state, and, in the absence of such forfeiture, may convey title.<sup>4</sup>] Returning the water, which has been di-

<sup>1</sup> *Davis v. Gale*, 32 Cal. 26; *Barkley v. Tieleke*, 2 Mont. 59; and see cases cited *ante*, concerning the mode of making an appropriation, due diligence in completing the works, etc.; and concerning the discharge of water into the stream without intent of "recapture."

<sup>2</sup> *Smith v. O'Hara*, 43 Cal. 371. But compare *Hindman v. Rizor*, 21 Oreg. 112, 27 Pac. Rep. 13.

<sup>3</sup> *Barkley v. Tieleke*, 2 Mont. 59. In both these instances, as has al-

ready been shown, no interest passes to the transferees; they do not succeed to any *priority* held by their assignor; their rights of priority date only from the time of their own possession and user.

<sup>4</sup> *Quigley v. Birdseye*, 11 Mont. 439, 28 Pac. Rep. 741. In this case the learned court observed: "In the chain of title of plaintiff to the ditch and water right which he claims, (the China ditch,) appear the names of some alleged

verted back into the natural channel of the stream without the intent of "recapturing" it, would be an express abandonment of all further rights to the use of such water; and the absence of any intent to "recapture" would generally be inferred, it seems, unless the returning of the water, after its first diversion, was made for the purpose of using the natural channel as a part of the appropri-

Chinamen as grantees from the older owners of the ditch, and as grantors to the plaintiff. Defendants claim that, under the doctrine of *Tibbitts v. Ah Tong*, 4 Mont. 536, 2 Pac. Rep. 759, and *Wulf v. Manuel*, 9 Mont. 270, 23 Pac. Rep. 723, Chinamen cannot take real estate, and therefore that the grant of this water right and ditch to the Chinamen was an abandonment by the original owners, and hence plaintiff took no title from the Chinamen. In those cases the real estate in question was mining claims upon the public domain of the United States. In *Wulf v. Manuel* we endeavored to make it clear that such mining claims were a class of real estate *sui generis*, and the doctrine of those cases was placed upon the peculiar character of the real estate in question, by virtue of the provisions of the United States statutes which opened the mineral lands of the United States to exploration and purchase by citizens of the United States and those who had declared their intentions to become such. We said in *Wulf v. Manuel*, page 285, 9 Mont., and page 725, 23 Pac. Rep.: 'No other persons may apply to purchase [such mineral lands] from the United States. The mineral lands of the government are not open

to exploration, occupation, or purchase by aliens. An alien may not even take or hold real estate of this class. \* \* \* Let it be conceded, in the case at bar, that the Chinamen who were a link in the chain of plaintiff's title were aliens. Let it be conceded that the ditch and water right were real estate. It was not real estate of any such nature as are possessory rights to mining claims upon the public domain of the United States. Its possession, or its right of possession, was not restricted, as are said mining rights, by a special statute of the United States, declaring that none should occupy or purchase it but citizens of the United States, and those who had declared their intention to become such. The inapplicability of the doctrine of *Tibbitts v. Ah Tong* and *Wulf v. Manuel* to real estate not clothed with the peculiar characteristics of possessory rights to mining claims is apparent. Therefore we have simply this proposition: The chain of title is A. to B. to C. to D. D. is in court with his title attacked because C. was an alien. The real estate is not a possessory right to a mining claim. All that is to be considered is therefore whether an alien may take real estate, and hold the same until office found,

ator's ditch or canal.<sup>1</sup> Again, an abandonment may be inferred from a neglect to use the water for an unreasonably long time, especially if the special purposes of its original appropriation had been fully accomplished. Thus, in an important case already quoted, the court, after saying that the prior appropriator of water for a particular mine may, when he has worked out and abandoned said mine, extend his ditch and use the water at other points, without losing his priority, further held that, where water had been appropriated for a particular purpose, and that purpose had been accomplished, the appropriators dispersed and allowed a long time to elapse without making any use of the water under their appropriation, and finally sold the ditch to other parties for a nominal sum, all these facts were sufficient evidence of an abandonment by them; in other words, an abandonment of their prior appropriation might be inferred from such conduct. The court further held that, when a party has abandoned his prior appropriation, he cannot, by a sale and conveyance, revive his prior rights in favor of his grantees, even though the sale is *bona fide* on their part.<sup>2</sup> On the other hand, the mere suspension of work in constructing a ditch for a lim-

against collateral attacks by third persons other than the sovereign, and whether such alien, in the absence of forfeiture by office found, may convey title to his grantee. Of this there is no doubt."

<sup>1</sup> Woolman v. Garringer, 1 Mont. 535; Davis v. Gale, 32 Cal. 26; Butte Canal Co. v. Vaughn, 11 Cal. 143. [A party cannot reclaim water that he has used and then allowed to pass from his control. Eddy v. Simpson, 3 Cal. 249; and see Schulz v. Sweeny, 19 Nev. 359, 11 Pac. Rep. 253.]

<sup>2</sup> Davis v. Gale, 32 Cal. 26. See also Kirman v. Hunnewill, 93 Cal. 519, 29 Pac. Rep. 124. [In

Lowden v. Frey, 67 Cal. 474, s. c. 8 Pac. Rep. 31, the court said: "The testimony tends to show that the appropriation of the water by the defendants and their grantors was for mining purposes generally, to be used at various points. Under such circumstances, the position of the plaintiff, that 'the right to the use of water for mining purposes ceases with the exhaustion of the mine for which it was appropriated,' has no application." It is not stated what would be the effect if the water were appropriated for use in one particular mine, and that mine became exhausted.]

ited and reasonable time would not necessarily be an abandonment of the appropriator's inchoate right.<sup>1</sup> It has already been shown in a previous section that one who has given notice of his intention to appropriate the water of a certain stream, must commence and prosecute his works unto completion with due and reasonable diligence, in order to perfect his exclusive right by appropriation. It seems to follow from this affirmative proposition that a neglect or failure on his part to use the due and reasonable diligence so required in constructing his works, must necessarily amount to an abandonment of the intended appropriation, and of all rights which could have been acquired by its means.<sup>2</sup>

[A corporation, which, under its charter, has the exclusive right to all the waters of a stream, and the exclusive privilege of using and controlling the same for various purposes, cannot allow such right to remain in abeyance for a long series of years, and thereafter assert the same to the exclusion of those who have, in the mean time, acquired rights to the use of such stream by actual appropriation and use, in pursuance of the general laws of the state.<sup>3</sup> On similar principles, if an irrigation ditch is abandoned and disused for a term of years, and then reopened to a less capacity than it formerly had, and so used for a long time, it cannot thereafter be increased to its original capacity, if that would operate to the detriment of intervening rights of third persons.<sup>4</sup> In Utah, the statute provides that a neglect for seven years to keep in repair any means of diverting or conveying water shall be held to be a forfeiture of the right.<sup>5</sup> And under this

<sup>1</sup> *Atchison v. Peterson*, 1 Mont. 561.

<sup>2</sup> See *ante*, § 52.

<sup>3</sup> *Platte Water Co. v. Northern Colorado Irr. Co.*, 12 Colo. 525, 21 Pac. Rep. 711.

<sup>4</sup> *Jatunn v. O'Brien*, 89 Cal. 57, 26 Pac. Rep. 635. See further, *Greer v. Heiser*, 16 Colo. 306, 26 Pac. Rep. 770; *Hewitt v. Story*, 51 Fed. Rep. 101.

<sup>5</sup> *Comp. Laws Utah*, § 2783.



law, it is held that one claiming an easement in a water-ditch crossing the land of another, and failing to make repairs thereon for the statutory period, forfeits his right to the ditch.<sup>1</sup> But the evidence to show an abandonment or forfeiture for non-user must be clear and complete. Where, for instance, the jury finds that an appropriator of water for placer mining did not use the water for five specified years, but finds that he did use it during an intervening year, and the testimony shows that during some of those years there was not water enough to work the mines, the evidence is not sufficient to establish an abandonment of the right.<sup>2</sup> So the fact that for several years a party has obtained his water exclusively through a neighbor's ditch, by agreement, will not affect his right to receive water through his own ditch, as against the neighbor's grantee.<sup>3</sup> And in at least one state it is held that, although one who has appropriated water for irrigating purposes abandons it, yet if no new-comer enters upon the land and uses the right during his absence, he may, upon his return, resume his rights, and avoid the effect of such abandonment.<sup>4</sup>

### § 98. Abandonment by adverse user.

[The right of the first appropriator of water on the public lands may be lost by the adverse possession of another; and when such other person has had the continued, uninterrupted, and adverse enjoyment of the water, or of some certain portion of it, for a sufficient length of time, the law will presume a grant of the right so held and enjoyed by him.<sup>5</sup> So far as the defense

<sup>1</sup>Stalling v. Ferrin, (Utah,) 27 Pac. Rep. 686.

<sup>2</sup>McCauley v. McKeig, 8 Mont. 389, 21 Pac. Rep. 22.

<sup>3</sup>Greer v. Heiser, 16 Colo. 306, 26 Pac. Rep. 770.

<sup>4</sup>Tucker v. Jones, 8 Mont. 225, 19 Pac. Rep. 571.

<sup>5</sup>Union Water Co. v. Crary, 25 Cal. 504; Smith v. Logan, 18 Nev. 149. Five years' adverse possession is sufficient to bar an action

of adverse possession or of equitable estoppel is concerned, it is immaterial whether or not the waters of the stream which fed the ditch were appropriated in compliance with the statute as to posting notices and other regulations.<sup>1</sup> A defendant may plead adverse possession of a ditch appurtenant to his land and running through plaintiff's land, though defendant has never paid any taxes assessed against plaintiff's land (which does not appear to have been taxed any higher on account of the ditch), but has always paid the taxes on his own land, the value of which was enhanced by the water from the ditch.<sup>2</sup> A failure to use for a time is competent evidence of abandonment; and if such non-user continues for an unreasonable period it may fairly create a presumption of intention to abandon; but this presumption is not conclusive, and may be overcome by other satisfactory proofs.<sup>3</sup> Thus where, in an action to try the title to a certain water right, the defendant denied plaintiff's alleged ownership, and set up title by adverse possession, the plaintiff, after proving prior appropriation in himself, might, in order to defeat the defense of the statute of limitations, show in rebuttal that the defendant, before any bar of the statute had attached, had acknowledged the plaintiff's claim, and endeavored to lease the said water right from the plaintiff.<sup>4</sup>]

to enforce a water right. *Evans v. Ross*, (Cal.) 8 Pac. Rep. 88. It is held in Oregon that non-user works no abandonment, unless continued long enough to give a title to realty under the statute of limitations. *Dodge v. Marden*, 7 Or. 456.

<sup>1</sup> *Coonrad v. Hill*, 79 Cal. 587, 21 Pac. Rep. 1099; *Frederick v. Dickey*, 91 Cal. 358, 27 Pac. Rep. 742.

<sup>2</sup> *Coonrad v. Hill*, 79 Cal. 587, 21 Pac. Rep. 1099.

<sup>3</sup> *Sieber v. Frink*, 7 Colo. 148, s. c. 2 Pac. Rep. 901. And see *Dorr v. Hammond*, 7 Colo. 79, s. c. 1 Pac. Rep. 693.

<sup>4</sup> *Ledu v. Jim Yet Wa*, 67 Cal. 346, 7 Pac. Rep. 731. See also *Oneto v. Restano*, 89 Cal. 63, 26 Pac. Rep. 788.

## VI. REVIEW OF THE SYSTEM.

§ 99. **This system as a whole.**

The foregoing summary of doctrines and rules presents the system of water rights, based upon prior and subsequent appropriations of streams and lakes situated within the public domain, or lands belonging to the United States, as that system has been built up by judicial decisions upon the foundation of local customs recognized and ratified by the legislation of congress. It is plain, upon an examination and comparison of the special rules formulated in the preceding sections, that the system, in theory at least, furnishes all the possible protection for the rights of subsequent and successive claimants after it has once admitted that a party can, by prior appropriation, obtain a prior and exclusive right to the water of a stream or lake, limited and measured only, in its extent, by the actual needs of the particular purpose for which the appropriation is made. The system places an obstacle in the way of a prior appropriator's obtaining an exclusive control of the entire stream, no matter how large; and secures the rights of subsequent appropriators of the same stream, by requiring that a valid appropriation shall be made for some beneficial purpose, presently existing or contemplated; and by restricting the amount of water appropriated to the quantity needed for such purpose; and by forbidding any change or enlargement of the purpose, which should increase the quantity of water diverted under the prior appropriation, to the injury of subsequent claimants; and by subjecting the prior appropriation to the effects of an abandonment, by which all prior and exclusive rights once obtained would be lost. By these means, a party is, in theory at least, prohibited from acquiring the exclusive control of a stream, or any part thereof, not for present and actual use, but for future, expected, and specula-

tive profit or advantage. In other words, a party cannot obtain the monopoly of a stream, in anticipation of its future use and value to miners, farmers, or manufacturers.

### § 100. Defects of the system.

While the theory thus appears to be admirable, the practical workings of the system may be attended with some difficulties, and they have certainly involved a great amount of litigation. When a prior appropriator has actually established himself on a stream, and is diverting its waters by ditches, an attempt to enforce the rights of a subsequent claimant may be difficult, and may require an expensive and protracted controversy. The prior appropriator is certainly placed in a position of great advantage in maintaining his own claims, even though unfounded and unlawful, against those who are seeking to enforce their subsequent and lawful rights to use the water of the stream. But the principal defect of the system, the one capable of working the greatest injustice, is inherent in the very theory itself, in its fundamental conception. This defect is the total absence of any limit to the extent of a prior appropriation,—to the amount of water which may be taken,—except the needs of the purposes for which it is made. The prior appropriator, in order to carry out a purpose regarded by the law as beneficial, of great magnitude,—such, for example, as an extensive system of hydraulic mining, or the irrigation of a large tract of farming lands, or, doubtless, the supply of a municipality,—*may* divert and consume, without returning to its natural channel, *the entire water* of a public stream, no matter what may be its size or length, or the natural wants of the country through which it flows. Furthermore, this appropriation may be made by a party who owns no land upon the banks of the stream, and for a purpose situated *at any distance* from the stream itself, far beyond the region to which the stream naturally belongs, and which would natu-

rally receive its benefits. In this manner the *natural* benefits of a stream to the lands situated upon its bank throughout its entire length *may be* completely destroyed, and the natural rights of all persons who should afterwards settle and purchase lands adjoining the stream *may be* totally ignored, disregarded, and abrogated by such a prior appropriation.

### § 101. Presumption that stream was on public land.

This first branch of the discussion may be appropriately ended by the statement of an important point just decided by the supreme court of California, that, in the absence of all evidence, it will be presumed that a stream, at the time when its waters were appropriated, was a public stream, and all the lands on its banks were public lands of the United States. There had been several successive appropriations of a stream called "Lytle Creek" by different parties. The court say: "There is nothing in the pleadings or findings to indicate that, when all the waters of Lytle creek were appropriated, any of the lands by or through which the creek flows had passed into private ownership. It must be presumed, therefore, that such lands were public lands of the United States, and the rights to the water of Lytle creek acquired by prior appropriations were confirmed by the act of congress of 1866. The court found that the settlement on government land by defendant was made after the act of 1866 took effect. Any rights which he might acquire, therefore, from the government, would be subject to the previously confirmed appropriations of the water."<sup>1</sup> This action was brought by a prior appropriator to restrain the defendant, a subsequent appropriator, from an alleged unlawful diversion. It appeared that there were other distinct and separate appropriators who were not parties to the suit. The court made the following important ruling

<sup>1</sup>Lytle Creek W. Co. v. Perdew, 2 Pac. Rep. 732.

concerning the necessary parties under such circumstances: "In an action by an appropriator of the water of a certain stream to restrain a defendant from diverting the same, when the court finds that the plaintiff has a separate title to the use of *all* water for a certain length of time out of a longer period, (namely, 'for one hundred and thirty-two hours and nineteen minutes out of each and every three hundred and seventy-two hours,') and that other appropriators had a right to the use thereof, but fails to find as to the order in which the persons interested in these appropriations used the water, or as to the times when the period during which the plaintiff was entitled to the exclusive use would recur, no decree fixing the rights of the plaintiff, or prohibiting the defendant from interfering therewith, can be rendered, unless all the other persons entitled to the use of the waters of the same stream are before the court as parties to the action." The judgment entered in favor of the defendant was therefore reversed, and the cause was remanded, with direction that the court below should order all persons owning or claiming rights to the use of any of the water of said creek to be made parties to the action.

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## CHAPTER VI.

### LEGISLATION ON WATER RIGHTS.

#### I. LEGISLATION ON THE SUBJECT.

- § 102. Distinction between appropriator and riparian owner.
- 103. Application of the common law.
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- 105. Nevada.
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#### II. THE EFFECT OF THIS LEGISLATION.

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#### I. LEGISLATION ON THE SUBJECT.

#### § 102. Distinction between appropriator and riparian owner.

The preceding discussion has been exclusively confined to the rights of appropriating and using the waters of public streams, flowing entirely through the public lands of the United States, before any private owner has acquired from the government, by patent or otherwise, the title to a tract or tracts of land upon their banks. All the decided cases heretofore cited, and all the judicial opinions, except perhaps a few *dicta* in one or two of

the very earliest California cases, have distinguished between the appropriation from these public streams, and the rights to the water after the land, or any part of it, bordering on a stream, has passed into the ownership of private proprietors. In the recent decisions, the court most carefully guards against any inference that they affect the rights of such owners, and expressly distinguishes between the rules laid down governing the taking and use of water from public streams, and those relating to "riparian proprietors" and "riparian rights," properly so called. I purpose now to examine the position of these "riparian proprietors," and to ascertain, as far as possible, what are their "riparian rights," under the law of the Pacific communities. If, before any appropriation whatever has been made of the waters of a stream hitherto wholly public, a private person acquires from the government the title to, and thus becomes the absolute owner of, a tract of land through which such stream runs, or even lying on one of its banks, although he makes no actual diversion of the water, an entirely new element is introduced into the problem. He is clearly not embraced within the operations of the doctrines heretofore explained. He is a true "riparian proprietor." His own rights over the stream are as complete and perfect as though all the other lands on its borders were held by private owners. The unrestricted right of diverting and using the water for some beneficial purpose by any prior appropriator does not exist against him. *A fortiori* is this so where many owners have acquired title to different tracts abutting on the stream, and finally where all the lands bordering on both sides of the stream through its whole length have passed into the ownership of private proprietors. There is then presented exactly the condition of circumstances which exists in England, and in the older and fully-settled states of the Union,—the condition in which the common-law doctrines concerning riparian rights arose, and to which they were originally applied.



**§ 103. Application of the common law.**

Assuming a stream to be so situated, with the lands on its banks owned by private proprietors, and assuming that no proprietor has yet made any actual diversion of its waters, the question is fairly presented, can any one of these owners, by means of a *prior* appropriation, acquire the right, as against the others, to divert, use, and consume any quantity of the water which may be necessary for some beneficial purpose, such as irrigating, mining, etc., and thus deprive all the other proprietors bordering on the stream, above and below him, of the benefits and uses of the stream, as may be done by the prior appropriator on a public stream? Or, on the other hand, are the rights of all these proprietors equal and alike, irrespective of any appropriation or diversion actually made by any one of them, and are their rights defined, measured, and regulated by the common-law rules concerning riparian proprietors; in other words, are their rights, in a true sense, the "riparian rights" recognized and protected by the common-law doctrines? Or, finally, if neither of these inquiries can be fully and unreservedly answered in the affirmative, has any other peculiar system of rules applicable to such persons been established, combining in some measure the common-law doctrines with the special doctrines touching the appropriation of public streams? Do the common-law rules wholly control? or do the doctrines concerning public streams govern? or has any other modified system of regulations been established? or is the whole matter still left in a condition of uncertainty, to be settled by the courts or the legislature? These are the questions which must be examined, and their answer, if possible, given. In pursuing this examination, we must ascertain—*First*, whether the statutes furnish any, and if so what, answer; and, *second*, what conclusions may be derived from judicial decisions. I shall, therefore, by way of introduction, give a summary of the legislation on the sub-

ject which has been adopted by the various states and territories embraced within our discussion.

#### **§ 104. Summary of statutory legislation—California.**

The Civil Code of California, which went into effect on the first of January, 1873, contains the following provisions, which, in terms, apply to all streams, public and private. Their language being general, not restricted to any class of streams, must, of course, be construed as applying to all. It will be noticed, however, that these provisions are a mere statutory declaration or enactment of the special rules which had been previously settled by the courts concerning the appropriation of public streams, virtually as formulated in the previous sections of this essay. The title of the Code is denominated "Water Rights," and contains the following sections, which I quote in full:

"Sec. 1410. The right to the use of running water flowing in a river or stream, or down a canyon or ravine, may be acquired by appropriation.

"Sec. 1411. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose the right ceases.

"Sec. 1412. The person entitled to the use may change the place of diversion, if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made.

"Sec. 1413. The water appropriated may be turned into the channel of another stream, and mingled with its water, and then reclaimed, but in reclaiming it the water already appropriated by another must not be diminished.

"Sec. 1414. As between appropriators, the one first in time is the first in right.

"Sec. 1415. A person desiring to appropriate water must post a notice in writing, in a conspicuous place, at the point of intended diversion, stating therein (1) that he claims the water here flowing to the extent of (giving the number) inches, measured under a four-inch pressure; (2) the purposes for which he claims it, and the place of intended use; (3) the means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it. A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted.

"Sec. 1416. Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain.

"Sec. 1417. By 'completion' is meant the conducting the waters to the place of intended use.

"Sec. 1418. By a compliance with the above rules, the claimant's right to the use of the water relates back to the time the notice was posted.

"Sec. 1419. A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith.

"Sec. 1420. Persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must, after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases.

"Sec. 1421. The recorder of each county must keep a book, in which he must record the notices provided for in this title."

All these provisions by themselves would furnish a reasona-

bly clear and certain system of rules applicable to *all* streams, whatever may be thought of their expediency or justice; but the following and final section turns the whole into utter doubt and uncertainty, so far as it can apply to private streams, or streams bordering on the lands of private owners. This final section is as follows:

“Sec. 1422. *The rights of riparian proprietors are not affected by the provisions of this title.*”

I would remark, in passing, that so far as the title applies to streams wholly public, on the banks of which there are as yet no riparian proprietors, and, of course, no “riparian rights,” it furnishes a system of rules which must be complied with by all those who seek to make an appropriation of the water subsequently to the going into effect of the statute. Thus, for example, the contents of the notice and the place of posting are definitely described; also the time within which work must be commenced after posting the notice is fixed in all cases; and the work must be prosecuted “uninterruptedly,” the only causes of interruption allowed being “snow or rain.” The early decisions prescribed no such definite rule, but left the time of commencing the work, and of prosecuting it to completion, to depend upon many other special circumstances of each case, such as the situation and physical conformation of the country, the difficulty of transportation, of obtaining materials and labor, and the like. So far, therefore, as the title applies solely to the appropriation of water from streams wholly public, it furnishes rules which must be obeyed, somewhat more definite and less elastic than those laid down by the courts; and as to its meaning, force, and effect, in connection with such streams, there seems to be no uncertainty nor difficulty.

In addition to these provisions of the Civil Code, there is a statute called “An act to promote irrigation,”<sup>1</sup> passed in 1872.

<sup>1</sup>St. 1871-72, pp. 945-948.

This statute provides that, if "owners of any body of lands susceptible of one mode of irrigation" desire to irrigate the same, they may take steps in connection with the board of supervisors by which they become an association for irrigating purposes. They may make by-laws for the appointment of trustees, who have general management of their affairs, and for the construction and maintaining of irrigating works. The powers and duties of these trustees are defined. Provisions are made for assessments upon the members of the association, for the purpose of defraying the cost of constructing and maintaining the works.

"Sec. 21. The trustees may acquire, by purchase, all property necessary to carry out and maintain the system of irrigation provided for.

"Sec. 22. The trustees may acquire by condemnation (1) the right to the use of any running water not already used for culinary or domestic purposes, or for irrigating, milling, or mining purposes; (2) the right of way for canals, drains, embankments, and other works necessary," etc.

"Sec. 23. The provisions of title 7, part 3, of the Code of Civil Procedure, (concerning the condemnation of private property for public uses,) are applicable to and the condemnation herein provided for must be made thereunder."

It is further provided that parties owning the whole district to be irrigated may proceed as above described, without appointing any trustees; that is, may manage the whole by themselves. This act is declared not to extend to the counties of Fresno, Kern, Tulare, and Yolo.

It is very plain that this statute does not contemplate nor recognize any right of land-owners to appropriate the waters of private streams; that is, of streams running through or adjacent to lands of private owners. The "riparian rights" of such owners are most certainly assured and protected; for the owners desiring to appropriate the water of such a stream must proceed

to condemn it under the right of eminent domain, and must of course pay compensation; and the only parties who could be compensated are the owners of lands on the banks of the stream, whose "riparian rights" to use its waters would be invaded. Such riparian rights, like all other rights of private property, are held subject to the state's power of eminent domain. [The legislation of this state also includes an important statute, passed in 1887, for the organization and government of "irrigation districts," the provisions of which will be fully summarized and discussed in a subsequent chapter devoted to that special subject.<sup>1</sup>]

### § 105. Nevada.

The earlier legislation of this state, bearing on the general subject-matter, is contained in certain sections of the general statutes which permit the construction of flumes or ditches for carrying water. Parties may construct a ditch or flume across private land, and to that end may take such land by right of eminent domain, on paying just compensation to the owner thereof; the amount of the compensation to be determined in a manner and by a proceeding described. This act shall not interfere with any prior or existing claim or right.<sup>2</sup> The statute makes no allusion to the appropriation of or acquisition of title to the water to be conducted by such ditches or flumes. This law was supplemented in 1887, by an act relating to the right to construct waste ditches, and providing a right of way for such ditches through the lands of others.<sup>3</sup>

<sup>1</sup>The statute referred to is the act of March 7, 1887; Stat. Cal. 1887, p. 29. It is commonly called the "Wright Act." It was amended and supplemented in several particulars by numerous statutes passed during the next four years.

<sup>2</sup>Gen. St. Nevada, 1885, §§ 362-365.

<sup>3</sup>Act of Feb. 26, 1887; St. Nevada, 1887, p. 83. And it was still further amended by the act of Mar. 9, 1889; St. Nevada, 1889, p. 96.

In this state, also, two important acts were passed in the year 1889. The first provides for a "Board of Reclamation Commissioners," and prescribes their powers and duties. The board is authorized to construct canals and ditches, for irrigating and other purposes, from any river or water-way of the state, having in view the distribution of the water in such manner as to benefit the greatest possible area.<sup>1</sup> This statute also contains provisions for the organization of irrigation districts, and the issue of bonds, under the supervision of the said board, but these provisions were probably superseded by the act of 1891, which authorized the formation of "irrigation districts" on a plan substantially identical with that in force in California under the "Wright Act." This statute will be again referred to in the chapter relating to "Irrigation Districts."

The other statute passed in 1889, was one providing for the appointment of "Water Commissioners." It is made the duty of these commissioners to divide the water in the natural lakes or streams of their districts among the several ditches taking water from the same, according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut and fastened, the head-gates of any ditch or ditches heading in any of the natural streams or lakes of the district, which in time of a scarcity of water makes it necessary by reason of the priority of the rights of others above or below them on the stream." This act also contains an elaborate system for the judicial determination of conflicting claims of priority.<sup>2</sup>

A recent decision of the supreme court of this state declares that the common-law doctrine of riparian rights,—

<sup>1</sup> Act of Mar. 9, 1889; St. Nevada, 1889, p. 102.

<sup>2</sup> Act of Mar. 9, 1889; St. Nevada, 1889, p. 107.

that every riparian owner is entitled to the natural flow of the stream through his land as it was wont to run,—is not applicable to the streams in Nevada, but the rights thereto should be determined by the doctrine of prior appropriation.<sup>1</sup>

### § 106. Montana.

The legislation of this state is in complete derogation of the common-law “riparian rights.” It will be noticed that the lands for which it provides the use of water may be situated anywhere within the state. Their situation on, near, or at a distance from streams is wholly immaterial. I give an abstract of the provisions, only quoting the exact language of the most important and fundamental provisions.<sup>2</sup>

Sec. 1239. Any person or corporation owning or having a possessory title to any agricultural land “shall be entitled to the use and enjoyment of the waters of the streams and creeks in said territory, for the purposes of irrigation and making said land available for agricultural purposes, to the full extent of the soil thereof.” Proviso, when by a prior appropriation any person has diverted all the water of a stream, or so much thereof that there is not an amount left sufficient for those having a subsequent right thereto for irrigation, then any surplus left by said prior appropriator shall be turned back into the stream for the use of subsequent claimants, with a penalty in the form of damages for a neglect to do so after demand made.

Sec. 1240. Any such person or corporation owning land, when there is no available water thereon, or when it is necessary to raise the water of “said stream,” so as to irrigate said land, or when said lands are too far removed from said streams to use them, said persons, etc., shall have a right of way *across any tract of land* for ditches, canals, flumes, etc.

<sup>1</sup>Reno Smelting Works v. Stevenson, 20 Nev. 269, 21 Pac. Rep. 317.

<sup>2</sup>Comp. St. Mont. 1887, §§ 1239-1249.



Sec. 1241. Such right only extends to the digging ditches, etc., across the land of another, as may be necessary.

Sec. 1242. All controversies between different claimants of water shall be determined by the dates of their respective appropriations.

Sec. 1243. All waters of streams are so available to the full capacity thereof for irrigating, "without regard to deterioration in quality or diminution in quantity," so as not to affect the rights of a prior appropriator; but in no case can water be diverted from the ditches, etc., of such appropriator.

Sec. 1244. Any person digging a ditch, etc., under section 1240, and thereby injuring the lands of another, shall be liable in damages to the injured party.

Sec. 1245. This act shall not impair rights already acquired.

Sec. 1246. Nor shall this act prevent the appropriation of said streams for mining, manufacturing, and other beneficial purposes, and the right to appropriate for such purposes is hereby declared and enforced.

Sec. 1247. Persons constructing ditches across public highways must repair the same.

Sec. 1248. Penalty for violation of last section.

Sec. 1249. All controversies respecting rights to water for any purposes, and the rights of parties to use water, shall be determined by the dates of their respective appropriations, "with the modifications heretofore existing under the local laws, rules, or customs, and decisions of the supreme court of said territory."

The legislation of this state also contains provisions regulating the appropriation of water, which are modelled upon the California Civil Code, §§ 1410-1421, and do not differ from the provisions of that statute in any fundamental particulars, although some of the details are not exactly identical.<sup>1</sup> And the same volume of statutes, in

<sup>1</sup>Comp. St. Mont. 1887, §§ 1250-1259.

the chapter concerning "corporations for industrial or productive purposes," authorizes the formation of companies for the purpose of taking and conducting water from streams for various beneficial purposes.<sup>1</sup> Further, the session laws for 1891 contain an act providing that proceedings to secure a right of way for a ditch or canal (as mentioned in § 1240 of the statutes, *ut supra*,) shall be commenced by a petition filed in the proper district court, a citation to the owners to appear and show cause why the right of way should not be granted, a hearing upon the allegations and proofs, and an assessment of the damages by three disinterested commissioners, from which assessment an appeal is given.<sup>2</sup>

### § 107. Colorado.

The statutes of this state, in their latest revision, also contain an elaborate system of rules concerning the use of water for irrigation, which resembles in its essential features that of Montana. It will be sufficient for my purposes to give a brief abstract of its provisions, quoting the exact language only of those which are fundamental.<sup>3</sup>

Sec. 2256. "All persons who claim, own, or hold a possessory right or title to any land or parcel of land within the boundaries of the state of Colorado, where these claims are on the bank, margin, or neighborhood of any stream of water, creek, or river, shall be entitled to the use of the water of said stream, creek, or river, for the purposes of irrigation, and making said claims available, to the full extent of the soil, for agricultural purposes."

Sec. 2257. When any such person, as mentioned in the last section, "has not sufficient length of area exposed to said stream

<sup>1</sup> Comp. St. Mont. 1887, §§ 446 *et seq.*      <sup>2</sup> Laws Mont. 1891, p. 295.

<sup>3</sup>1 Mills' Ann. St. Colo. §§ 2256 *et seq.*

to obtain a sufficient fall of water to irrigate his land, or that his farm, etc., is too far removed from said stream, and that he has no water facilities on those lands, he shall be entitled to a right of way through the farms or tracts of land which lie between him and said stream, or the farms or tracts of land which lie above and below him on said stream, for purposes hereinbefore mentioned."

Sec. 2258. The right of way given by the last section only extends to the construction of a ditch or canal sufficient for the purpose of carrying the water required.

Sec. 2259. If the amount of water is not sufficient to furnish a constant supply to all the community using a ditch or canal, provision is made for allotting it to different consumers on alternate days or times.

Sec. 2260. If the owners of tracts of land refuse to allow ditch-owners a right of way, the right may be obtained by condemnation, under the power of eminent domain.<sup>1</sup>

Secs. 2261-2265. Special provisions regulating the use, maintenance, repair, etc., of ditches.

Sec. 2266. The ditches herein provided for are for irrigation only.

Sec. 2267. In case of a deficiency in the supply of water, provision is made for regulating its *pro rata* distribution among the consumers entitled. Additional sections provide for the formation and management of public irrigation districts; for the defraying the expenses of constructing, maintaining, repairing, etc., the ditches therein; for the regulation of the water

<sup>1</sup> [In Colorado, when a person without initiating any steps under pre-emption or other laws to procure title to public lands, places improvements thereon, and another desires to construct his irrigating ditch over or across such lands, if, by a proper proceeding,

full compensation is determined and is paid for all damage or injury to the improvements caused by constructing such ditch, the constitutional and statutory requirements are complied with. *Knoth v. Barclay*, 8 Colo. 300, s. c. 6 Pac. Rep. 924.]

supply and distribution; for the rates of charge, etc.<sup>1</sup> These provisions will be considered in detail in the subsequent chapters relating to irrigation and ditch companies and to public irrigation districts.

Secs. 2399-2439. An elaborate system is provided for the adjudication of rights of priority among different appropriators, partly by means of special proceedings, and partly by means of ordinary actions.

Another portion of these statutes authorizes the formation of corporations to take and convey the water of streams for mines, mills, irrigation, etc.<sup>2</sup> These provisions also will be considered in a later chapter.

[We append here those provisions of the constitution of Colorado which relate to the subject of water rights and the right of appropriation.

Art. 16, Sec. 5. "The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

Sec. 6. "The right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied.<sup>3</sup> Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other

<sup>1</sup> Mills' Ann. St. Colo., §§ 2310-2392, and 2440-2469.

<sup>2</sup> Id., §§ 567-574, 949-956, 2261-2309.

<sup>3</sup> Under this clause it is held that, while the legislature cannot prohibit the appropriation or di-

version of water, for useful purposes, from natural streams upon the public domain, it has the power to regulate the manner of such appropriation or diversion. *Larimer Co. Reservoir Co. v. People*, 8 Colo. 614, 9 Pac. Rep. 794.

purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

Sec. 7. "All persons and corporations shall have the right of way across public, private, and corporate lands for the construction of ditches, canals, and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.

Sec. 8. "The general assembly shall provide by law that the board of county commissioners, in their respective counties, shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations."]

## § 108. Idaho.

The revised statutes of this state contain a title on the subject of "Water Rights and Irrigation."<sup>1</sup> A portion of this statute is the same in substance, with some variations in the detail, as the provisions hereinbefore quoted from the Civil Code of California, while the remainder follows the system prevailing in Colorado and Montana. We quote the essential provisions as follows:—

Sec. 3155. "The right to the use of running water flowing in a river or stream, or down a canyon or ravine, may be acquired by appropriation."

Sec. 3156. "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases."

<sup>1</sup> Rev. St. Idaho, §§ 3155-3205.

Sec. 3157. The appropriator may change the place of diversion, etc., if no injury is done to others.

Sec. 3158. "The water appropriated may be turned into the channel of another stream, and mingled with its water, and then reclaimed; but in reclaiming it, the water already appropriated by another must not be diminished."

Sec. 3159. "As between appropriators, the one first in time is first in right."<sup>1</sup>

Sec. 3160. Notice must be given of the appropriation, substantially as in California.

Sec. 3161. The works intended to make the appropriation effective must be commenced within sixty days after the notice, and prosecuted "diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain."

Sec. 3162. "Completion" means conducting the waters to the place of intended use.

Sec. 3163. "By a compliance with the above rules, the claimant's right to the use of the water relates back to the time the notice was posted."

Sec. 3164. "A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith."

Secs. 3165-3167. Ditches, appropriations, and claims heretofore made are protected.

These provisions plainly do not differ in any material manner

<sup>1</sup> Under this provision, it is held, the court must determine the date and amount of each appropriation, and from these facts determine the priority of right. *Kirk v. Bartholomew*, (Idaho,) 29 Pac. Rep. 30. One who, by himself and his grantors, has appropriated first all the waters of a creek, and has continually used the same for the pur-

pose of irrigating the lands owned by him, upon and along said creek, is entitled to all of said waters, to the extent of the capacity of his ditches necessary to the proper irrigation of his said lands, as against subsequent locators. *Hillman v. Hardwick*, (Idaho,) 28 Pac. Rep. 488.

from those of the California Civil Code. The following sections contain the essential elements of the Colorado and Montana legislation:

Sec. 3180. "All persons, companies, and corporations, owning or claiming any lands situated on the banks or in the vicinity of any stream, shall be entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed."

Sec. 3181. When any such person, etc., has not sufficient frontage on a stream to afford a sufficient fall for such a ditch, or when his land is back from a stream and convenient facilities for irrigation cannot otherwise be had, he "shall be entitled to a right of way through lands of others for the purposes of irrigation." Proviso, that he shall keep his ditch in good repair, and shall be liable to the owner of the land which it crosses for injuries caused by overflow or neglect or accident.

Sec. 3182. If the owner of the land refuses a right of way, the same may be obtained by condemnation, upon payment of the compensation as fixed.

Sec. 3183. Provisions for ascertaining and fixing such compensation by appraisers.

Sec. 3184. Persons, etc., having land adjacent to any stream may place in its channel or on its banks dams, etc., to raise the water above the level of the banks; and a right of way for conducting such waters across the lands of others may be acquired in the manner prescribed in the last two sections.

Secs. 3185, 3186. Provisions as to maintaining and keeping in repair the ditches; not to do damage, etc.

Sec. 3187. All rights acquired previous to this act are not affected thereby.

Sec. 3188. When the water is not enough to fully supply a whole community or neighborhood, it must be distributed among them according to the local customs as established and as recognized by the courts.

Sec. 3189. If a ditch is constructed in order to sell the water for irrigation, persons shall be entitled to said water at the usual rates, in the following order, viz.: *First*, all persons through whose land the ditch runs, in the order of their location along the line of the ditch; *second*, after the last named, then those on either side of the ditch,—those at the same distance each side being equally entitled, etc. Excessive use by any one is prohibited.

Another chapter of this title relates to the distribution of water for purposes of irrigation.<sup>1</sup> This statute provides for the creation of water or irrigation districts, and for the election of a “water-master” in each; and minutely prescribes his duties of superintending the ditches, their repair, the distribution of water among consumers, etc.

### § 109. North Dakota.

A recent statute of this state adopts the fundamental notion of the Colorado, Montana, and Idaho legislation; but extends the right of appropriation equally to all beneficial purposes, as well as that of irrigation.<sup>2</sup>

Section 2029. Any person or corporation, having title or possessory right to any mineral or agricultural land, shall be entitled to the use and enjoyment of the water of any stream, creek, or river within the state, for mining, milling, agricultural, or domestic purposes; but this shall not interfere with rights previously acquired.

Sec. 2030. Such persons may have a right of way across the lands of others under the same circumstances as prescribed in the Colorado, Montana, and Idaho statutes.

Sec. 2031. This right of way shall only extend to the construction of a suitable ditch, or canal, etc.

<sup>1</sup> Rev. St. Idaho, §§ 3200–3205.

<sup>2</sup> Comp. Laws Dak. 1887, §§ 2029–2036.



Sec. 2032. All controversies between different claimants of water shall be determined by the dates of their respective appropriations.

Sec. 2033. "The water of the streams, rivers, and creeks of this territory may be made available to the full extent of the capacity thereof, for mining, milling, agricultural, or domestic purposes, without regard to deterioration in quality or diminution in quantity, so that the same do not materially affect or impair the rights of prior appropriators."

Sec. 2034. If the owner of lands sustains injury by a ditch constructed across it, under section 2030, the ditch-owner shall be liable to him in damages therefor.

Sec. 2035. Relates to the abandonment of ditches or appropriations.

Sec. 2036. Prescribes penalties for violation of foregoing provisions.

One remarkable feature of this statute is that, unlike those of Colorado and Idaho, it makes no provision whatever for obtaining a right of way for a ditch across the lands of another owner, by condemnation. It seems to permit an appropriator to construct his ditch across the lands of another, without the latter's consent, without any compensation ascertained and paid, and without the necessity of any proceedings for a condemnation. The only provision for the benefit of such land-owner seems to be a right to recover damages, if *any injury* is caused by the ditch. Such legislation is, to say the least, remarkable. It seems to be a plain invasion of the rights of private property, an evident violation of the constitutional prohibition against depriving a person of his property without due process of law, and taking private property for public use without just compensation. That such a provision is invalid seems hardly to admit of a doubt.

**§ 110. South Dakota.**

In this state, the same provisions in respect to appropriation and water rights are in force as in North Dakota, both of these states having adopted the laws which were in force in the former territory of Dakota on these subjects.<sup>1</sup> But South Dakota has also adopted legislation authorizing the formation of private corporations for the sinking of artesian wells, and the sale and distribution of the water obtained therefrom;<sup>2</sup> and also a law authorizing townships to sink such wells and bond the indebtedness created by the expense thereof.<sup>3</sup> These laws will be fully noticed in later chapters.

**§ 111. New Mexico.**

In this territory the use of water for the purposes of irrigation is made paramount to all other uses, for milling, manufacturing, and the like. The general laws contain an elaborate system of legislation for the construction and maintenance of public and private "*acequias*" or irrigating canals. This system is embodied in the statutes of several successive legislatures, and is evidently borrowed from the Mexican law.<sup>4</sup>

Section 1. "All inhabitants of the territory of New Mexico shall have the right to construct either private or common [*i. e.*, public] *acequias*, and to take the water for said *acequias* from wherever they can, with the distinct understanding to pay the owner through whose land said *acequias* pass a just compensation taxed for the land used." Provision is made for appraising and fixing the amount of such compensation, in cases of dispute, by appraisers to be appointed by a probate judge. [It may be re-

<sup>1</sup> Comp. Laws Dak. 1887, §§ 2029-2036.

<sup>2</sup> Sess. Laws S. Dak. 1890, c. 103, p. 245.

<sup>3</sup> Sess. Laws S. Dak. 1891, c. 80, p. 196.

<sup>4</sup> Gen. Laws N. M. 1880, pp. 13-23, embracing Acts 1851, 1852, 1861, 1863, 1866, and 1880, concerning "*acequias*," or irrigating canals.

marked that these early statutes were originally enacted and published in the Spanish language. The translation found in the last edition of the General Laws, from which these sections are quoted, is extremely literal, and sometimes fails to adopt the precision and certainty of expression usual in our English and American statutes.]

Sec. 2. "No inhabitant of said territory shall have the right to construct any property to the impediment of the irrigation of land or fields, such as mills or other property that may obstruct the course [*i. e.*, flow] of the water; as the irrigation of the fields should be preferred to all others, [*i. e.*, to all other uses.]"

Sec. 4. All owners of tillable lands shall labor on public *acequias*, whether they cultivate the land or not.

Sec. 9. "All rivers and streams of water in the territory formerly known as public *acequias* or ditches are hereby established and declared to be public *acequias* or ditches."

The foregoing quotations sufficiently indicate the essential nature of this system, without going into any further detail. Subsequent portions of the statute make provision for the election of "overseers" in different precincts, and define their duties in managing the *acequias*, and in distributing the water supply. Ample provision is made for maintaining the ditches, and for keeping them in repair by public labor, etc. The legislation of this territory also contains provisions for the organization and operation of irrigation and ditch companies. This statute will be found epitomized in a subsequent chapter.

## § 112. Arizona.

The legislation of this territory on the subject of water rights resembles that of New Mexico in numerous respects. The fundamental principle that the water of all rivers, creeks, and streams in the territory is public, and incapable

of private and exclusive ownership, is declared in the following explicit terms: "The common-law doctrine of riparian water rights shall not obtain or be of any force or effect in this territory."<sup>1</sup> The appropriation and use of water is regulated by the provisions of certain sections of the Revised Statutes concerning irrigating canals and *acequias*, which may be summarized as follows:

Sec. 3199. All rivers, creeks, and streams of water are declared to be public and applicable for purposes of irrigation and mining.

Sec. 3200. All *acequias* at present established shall be continued and rights therein shall not be disturbed.

Sec. 3201. All the inhabitants of the territory who own or possess arable or irrigable lands shall have the right to construct public or private *acequias*, and obtain the necessary water for the same from any convenient river, creek, or stream of running water.

Sec. 3202. Such *acequias* may be run through the land of another when necessary, the damages by way of compensation to be assessed by the probate judge of the proper county in a summary manner.

Sec. 3203. No interference with these *acequias* shall be permitted, by dams or other structures, except when used for mining purposes as otherwise provided. It is declared that "the right to irrigate the fields and arable lands shall be preferable to all others."

Sec. 3204. Parties using water for mining purposes must pay compensation in damages for injury thereby caused to irrigating canals or *acequias* already existing.

The laws of this territory also contain detailed provisions as to the government and operation of public *acequias*, forming a system analogous to that of the "irrigation dis-

<sup>1</sup>Rev. St. Ariz. 1887, § 3198.

tricts" in California and some other states. These provisions will be recited in the chapter devoted to that subject.

### § 113. Wyoming.

The legislation of this state is the same in substance, and almost identical in language, with that of Colorado, heretofore described.<sup>1</sup>

Section 1317. Any person or corporation having the title or the possessory right to any tract of land within the territory is entitled to the use of the water of any stream, etc., for purpose of irrigation, and of making the land available for agriculture, etc.

Secs. 1318-1324. To that end, such person, etc., may have right of way across the lands of another for a ditch. Such right of way may be acquired by condemnation, the compensation therefor being fixed by appraisers. When the supply of water is not sufficient to furnish a full amount to an entire community, it is to be apportioned among them. Owners or occupants bordering on streams may place dams in the channel or on the banks in order to raise the water, and may have a right of way to conduct such water. Prior vested rights to the use of water are protected. Provision for keeping ditches, etc., in good repair, etc. [But it is to be noted that these provisions are in some part modified, and in some part repealed, by the act of Dec. 22, 1890, (Laws Wyom. 1890-91, p. 91,) relating to the "supervision and use of the waters of the state," and which provides for a division of the state into water-districts, with public officers in each having control of the appropriation and use of the waters therein. There are also, in this state, statutory provisions regulating the organization and operation of "irrigation and ditch companies." Both these systems will be noticed in later chapters.]

<sup>1</sup>Rev. St. Wyom. 1887, §§ 1317-1324.

**§ 114. Utah.**

The General Statutes and Session Laws of this territory contain an elaborate and detailed system of regulations devoting the water of all streams to the purpose of irrigation. The common-law doctrines concerning property in the waters of streams, and "riparian rights," are completely abrogated. The leading statute concerning irrigation<sup>1</sup> provides for the formation of irrigation districts. The citizens of such districts may be organized into irrigation companies, and may elect trustees for the management of these companies. A tax may be levied upon the lands in each district benefited in order to defray expenses. Land may be condemned for ditches, etc. All ditches and other works become the property of the company, etc. No irrigation company shall be entitled to divert the waters of any stream to the injury of any irrigation company or person holding a prior right to the use of said water.

A more recent statute regulates the use of water by private persons, and protects their rights to such use, supplementary to the former system.<sup>2</sup> The selectmen of each county are made "water commissioners," and have general power to manage irrigation, and to regulate the use and distribution of water among the land-owners of their respective counties. This statute contains provisions, not found in any other legislation, which divide the vested rights of private persons to use water for domestic, agricultural, manufacturing, and all other beneficial purposes, into two grades, "primary" and "secondary," of which

<sup>1</sup> 2 Comp. Laws Utah, 1888, §§ 2403-2427, being an act (of Mar. 13, 1884) "compiling the laws relating to the incorporation of irrigation companies." [Where parties, with the knowledge and consent of the original constructors of an irrigation ditch, work upon and assist in widening and repairing the same,

with the tacit understanding that they are to be entitled to use the same, they thereby acquire right and title to such ditch, and to the water therefrom. *Lehi Irrigation Co. v. Moyle*, 4 Utah, 327, 9 Pac. Rep. 867.]

<sup>2</sup> 2 Comp. Laws Utah, 1888, §§ 2775-2789.

the "secondary" is the subordinate grade. The "primary" vested rights exist (1) when any person or persons shall have taken, diverted, and used any of the unappropriated water of any natural stream, lake, or spring, or other natural source of supply; (2) when any person or persons shall have had open, peaceable, uninterrupted, and continuous use of water for a period of seven years. The "secondary" rights exist, subject to the "primary," (1) when the whole water of any stream, lake, or spring, or other natural source of supply, has been taken, diverted, and used by prior appropriators for a part or parts of each year, and other persons have subsequently appropriated said water during other parts of said year; and (2) when the unusual increase of the water of a stream, over and above its average amount for seven years, has been appropriated and used by any person or persons, and the ordinary or average flow of the same stream has been appropriated and used by other persons.

### § 115. Oregon.

In this state, the most important statute on the subject of water rights is an act (passed in 1891) for the organization and government of irrigation and ditch companies.<sup>1</sup> The detailed discussion of it belongs to a later part of this work. But it is necessary here to remark that this statute expressly recognizes the common-law doctrine of riparian rights as being in force in Oregon. For it provides (sec. 8) that "such corporation may maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it purposes to divert water below the point of diversion vested in the owners of lands lying contiguous to such stream by virtue of their location. . . . But no person owning lands lying contiguous to any stream shall, without his consent, be de-

<sup>1</sup>Laws of Oreg. 1891, p. 52.

prived of water for household or domestic use, or for the purpose of watering his stock, or of water necessary to irrigate crops growing upon such lands and actually used therefor.”<sup>1</sup> That the doctrine of appropriation also obtains in this state, in cases where it would not conflict with the rights of riparian owners, will sufficiently appear from the Oregon decisions cited in the preceding pages of this work.

### § 116. Washington.

The laws of this state, upon the subject of water rights and irrigation, at present exhibit a great deal of confusion and ambiguity, in consequence of the attempt to adopt and unite several different systems of legislation, in force in other states, but not admitting of being blended into a consistent whole. One of these statutes, dealing with the right to appropriate water, contains provisions very similar to those of the California Civil Code, already quoted. Thus, it enacts that the right to the use of water may be acquired by appropriation (the language is general and is not restricted to waters on the public lands); that as between appropriators the first in time is first in right; that notice must be posted; that the work must be commenced within a certain time and diligently and continuously prosecuted to completion; that the appropriator's right relates back to the posting of the notice, but failure to comply with the law deprives him of the right as against any one who does comply with it; that existing valid appropriations shall be protected; that the right to the use of water may be transferred by deed; and that the appropriator may change the purpose of his appropriation.<sup>2</sup>

<sup>1</sup> See, also, *Hayden v. Long*, 8 Oreg. 244.

<sup>2</sup> 1 Hill's Ann. St. Wash. §§ 1709-1717.



Another statute provides for the case of persons who desire to conduct water to their lands, for purposes of irrigation, from streams at a distance, giving them the right of way over the lands of others for their ditches. This act is similar in its provisions to that in force in Idaho, which we have already quoted.<sup>1</sup>

Another part of the same code includes provisions for the organization of "irrigation districts."<sup>2</sup> This is substantially the same as the "Wright act" in California, and is in great part a literal transcript of that act. There is also a system of rules for the formation of irrigation and ditch companies, which exhibit a marked similarity to those enacted in Oregon.<sup>3</sup> To these statutes we shall recur in a later chapter.

It might appear from the foregoing that the common-law doctrine of riparian rights was effectually abolished, or at least had an extremely limited applicability, in the state of Washington. But on the other hand, certain clauses in the statutes seem expressly to recognize that doctrine as still continuing in force. Thus, in the law giving to irrigation companies the power of eminent domain for the acquisition of the water rights needed by them, it is provided: "The right herein given to condemn the use of water shall not extend any further than to the riparian rights of persons to the natural flow of water through lands upon or abutting said streams or lakes, as the same exist at common law, and is not intended in any manner to allow water to be taken from any person that is used by said person himself for irrigation, or that is needed, for that purpose by any such person."<sup>4</sup>

<sup>1</sup> Hill's Ann. St. Wash. §§ 1719-1722.

<sup>2</sup> Id. §§ 1784-1861.

<sup>3</sup> Id. §§ 1718-1782.

<sup>4</sup> Id. § 1774.

§ 117. **Texas.**

In this state, we find certain legislation which bears a marked resemblance to that adopted in certain of the Pacific communities, and which was no doubt induced by similar geographical and social conditions. It seems proper, therefore, to mention it in this connection. A recent statute<sup>1</sup> contains the following provisions:

Sec. 1. "The unappropriated waters of every river or natural stream within the arid portions of the state of Texas, in which, by reason of the insufficient rainfall, irrigation is necessary for agricultural purposes, may be diverted from its natural channel for irrigation, domestic, and other beneficial uses. Provided that said water shall not be diverted so as to deprive any person who claims, owns, or holds, a possessory right or title to any land lying along the bank or margin of any river or natural stream of the use of the water thereof for his own domestic use."<sup>2</sup>

<sup>1</sup>Sayles' Addendum to Ann. St. Tex., tit. 55, "Irrigation," art. 3000a. This is the act of Mar. 19, 1889.

<sup>2</sup>In the case of McGhee Irrigating Ditch Co. v. Hudson, (Tex.) 21 S. W. Rep. 175, the court sustained this statute against objections to its validity on the score of uncertainty. It was said: "The contention of appellant is that the act is not void and uncertain, as the court will take judicial knowledge of the locality of the arid region referred to in the act. We agree with appellant that the act of the legislature in question is not void for uncertainty, but not for the reason given by him. Judicial knowledge may in some cases extend to geographical lines and subdivisions, and to certain

generally well-known climatic conditions that may exist in certain localities, that are known by virtue of the fact that they are a part of the general history of the land,—such, for instance, as that characterize the desert of Sahara. But no such fact is gathered from the geography of the country, or the general history of the state, that informs us where the arid region begins, and where it ends. The court cannot judicially know that a certain county in the state is in an arid region. But we think the law should stand, as sufficiently definite and certain, because the arid portion of the state to which the act shall apply is indicated and defined by the first and second sections of the law. The law reads, (first section:) "That the

Sec. 2. "The unappropriated waters of every river or natural stream within the arid portion of the state, as described in the preceding section of this act, are hereby declared to be the property of the public, and may be acquired by appropriation for the uses and purposes as hereinafter provided."

Secs. 3-9. These sections contain provisions regulating the manner and effect of the appropriation. They are modelled upon the corresponding provisions of the Civil Code of California (§§ 1410-1421), but differ from them in some particulars. For example, instead of posting a notice, the appropriator is to file a sworn statement in the office of the county clerk, together with a map showing the route of his ditch or canal. The work is to be begun within ninety days after the filing of the statement. The same act also contains provisions for the organization and

unappropriated waters of any river or natural stream within the arid portions of the state of Texas, in which, by reason of the insufficient rainfall, irrigation is necessary for agricultural purposes, may be diverted from its natural channel for irrigation," etc. (Second section:) "That the unappropriated waters of any river or natural stream within the arid portions of the state, as described in the preceding section of this act, are," etc. We think the benefits of this act are limited to that arid portion of the state where rainfall is insufficient, and irrigation is necessary, for agricultural purposes; and a party seeking its benefits must show this condition of things.

The act is not void and uncertain because it may require evidence to give it application. This is permitted and required under a great many statutes under which rights

of property are acquired. There are laws of the United States that permit parties to acquire swamp lands, timber lands, mineral lands, etc., and certain laws of this state that permit purchasers to acquire agricultural lands and pasture lands belonging to the common-school fund. These laws did not pretend to designate the locality of the class of lands mentioned, but left that to be ascertained as a fact, and when so done the law was applied. In construing these statutes it has never been pretended, so far as known to this court, that they were void for uncertainty; and such a construction, if adopted, we apprehend, would prove disastrous to many titles throughout the entire Union. Other laws could be mentioned, to the same effect, but enough have been cited to illustrate the tenor of legislation upon such subjects."

government of irrigation companies, which will be hereafter noticed.

### § 118. Nebraska.

In this state there is a statute relating to the appropriation of water,<sup>1</sup> which is copied, in great part, from the provisions of the California Civil Code, §§ 1410-1421, heretofore quoted, but differs from that statute in some important particulars, of which the principal are as follows:

There is a provision that no tract of land, without the owner's consent, shall be crossed by more than one ditch or canal if one will answer the purpose for which a second is desired or intended. (Sec. 3.)

"The water appropriated from a river or stream shall not be turned or permitted to run into the waters or channel of any other river or stream than that from which it is taken or appropriated." (Sec. 6.)

It is provided that "in all streams not more than fifty feet in width the rights of the riparian proprietors are not affected by the provisions of this act." (Sec. 1.)

The legislation of this state also contains a system of provisions for the securing of a right of way for irrigating ditches, substantially similar to the law in Colorado, already noticed.<sup>2</sup>

### § 119. Federal legislation.

In connection with the subject of legislation concerning water rights, it is important to call attention to the acts of congress providing for the reclamation and sale of desert lands. The principal statute on this subject is the act of March 3, 1877.<sup>3</sup> It provides that it shall be

<sup>1</sup>Comp. St. Nebr. 1891, c. 93a, p. 844.

<sup>3</sup>19 U. S. St. at L. 377; 1 Supp. to Rev. St. U. S. p. 137.

<sup>2</sup>Id. p. 845.

lawful for any citizen, upon payment at the rate of twenty-five cents per acre, to file a declaration of his intention to reclaim a tract of desert land, not exceeding one section, by conducting water upon the same, within a period of three years thereafter. "Provided, however, that the right to the use of water by the person so conducting the same on or to any tract of desert land of 640 acres shall depend upon *bona fide* prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights." The said declaration is to contain a particular description of the land. A patent may be issued at any time within three years after the filing of the declaration, upon satisfactory proof being made of the reclamation of the land in the manner aforesaid, and upon payment of the additional sum of one dollar per acre. No person shall be permitted to enter more than one tract of land, and the tract shall be in compact form and shall not exceed 640 acres.

Sec. 2. "That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated."

Sec. 3. This act shall apply and take effect in California, Oregon, Nevada, Washington, Idaho, Montana, Utah, Wyo-

ming, Arizona, New Mexico, and Dakota; "and the determination of what may be considered desert land shall be subject to the decision and regulation of the commissioner of the general land office."

This act was amended and supplemented by an act approved March 3, 1891,<sup>1</sup> which adds to it the following sections:

Sec. 4. "That at the time of filing the declaration hereinbefore required, the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections, or fractional parts of sections, of desert lands, may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plan of internal improvements."

Sec. 5. "That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of the whole tract reclaimed and patented." That is, such money is to be expended at the rate of at least one dollar per acre within each of the three years next succeeding the entry. Proof of such expenditure is to be made annually by the affidavits of two or more credible witnesses, and at the end of the third year a map or plan is to be filed, showing the charac-

<sup>1</sup>26 U. S. St. at L. 1095; 1 Supp. to U. S. Rev. St. p. 940.

ter and extent of the improvements. But a patent may issue at any time upon making the required proof of the total required expenditure. And further, proof shall be required of the cultivation of one-eighth of the land.

Sec. 6. Existing claims may be perfected either under the act of 1877 or under the present act.

Sec. 7. "That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and the receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns. But no person or association of persons shall hold, by assignment or otherwise, prior to the issue of patent, more than 320 acres of such arid or desert lands, but this section shall not apply to entries made or initiated prior to the approval of this act."

Sec. 8. The provisions of the whole act are made applicable to the state of Colorado, as well as the states named in the original act. "And no person shall be entitled to make entry of desert land except he be a resident citizen of the state or territory in which the land sought to be entered is located."

## II. THE EFFECT OF THIS LEGISLATION.

### § 120. Riparian rights abolished.

It is plain from the foregoing summary that in Montana, Colorado, Idaho, North Dakota, South Dakota, New Mexico, Arizona, Wyoming, and Utah, the legislation has wholly abandoned and abrogated all the common-law doctrines concern-

ing private property in streams and lakes, and concerning the "riparian rights" of "riparian proprietors." The statutes in express terms apply to all streams, as well those running through public lands as those bordered by the lands of private owners. No exception from their operation is made in favor of persons owning land on the banks of a stream. Under these statutes no proprietor derives any legal benefit or advantage from the fact that his land is immediately adjacent to a stream. Unless he has made an actual appropriation and diversion of its water for the use of his own land, he is liable to have perhaps the entire stream appropriated and diverted away for the benefit of a proprietor whose land is situated at any distance from the stream. In fact, a proprietor immediately adjoining a stream is, by reason of his position, subject to a liability which must often be a grievous burden upon the land, and a serious interference with his rights of private property; namely, the liability to which his land is exposed of having ditches or canals constructed across it without his consent, for the purpose of conducting water from the stream to more distant lands. Even though this right of aqueduct across the land of a private owner must be acquired by condemnation, under the exercise of the power of eminent domain, and upon payment of compensation, still it must be a most material incumbrance upon all riparian owners, and hindrance to their enjoyment and free use of their own property. The statutes of one territory seem to go to the extreme of permitting canals and ditches to be constructed across the lands of private owners, against their consent, without any condemnation or any compensation. Such a statutory provision seems to be a most palpable and express invasion of private property rights, and it is difficult to understand upon what principle its validity can be upheld. And yet the early decisions in Colorado *seem* to hold that all lands of private owners are subject to the rights of others to locate and construct irrigating canals and



ditches over them, and that the statute on this subject is simply declaratory of the common law in that commonwealth.<sup>1</sup>

<sup>1</sup>See *Yunker v. Nichols*, 1 Colo. 551; *Schilling v. Rominger*, 4 Colo. 100; *Crisman v. Heiderer*, 5 Colo. 589. [The extent to which the common-law rule has been abrogated in some of these states, and the reasons for it, may be seen in the following cases: *Oppenlander v. Left Hand Ditch Co.*, (Colo.) 31 Pac. Rep. 854; *Reno Smelting Works v. Stevenson*, 20 Nev. 269, 21 Pac. Rep. 317; *Clough v. Wing*, (Ariz.) 17 Pac. Rep. 453; *Stowell v. Johnson*, (Utah.) 26 Pac. Rep. 290. In the case last cited it was said: "Riparian rights have never been recognized in this territory, or in any state or territory where irrigation is necessary; for the appropriation of water for the purpose of irrigation is entirely and unavoidably in conflict with the common-law doctrine of riparian proprietorship. If that had been recognized and applied in this territory, it would still be a desert." In *Oppenlander v. Left Hand Ditch Co.*, *supra*, the court had occasion to inquire into the differences between the common-law doctrine of water rights and that established by the constitutional provisions in Colorado. The following language was employed: "Upon examination, we find few points of analogy and many points of difference between water rights at common law and water rights under the constitution of this state. For illustration, note the following: At common law the water of a natural stream is an incident of the soil through which it flows. Under

the constitution the unappropriated water of every natural stream is the property of the public. At common law the riparian owner is, for certain purposes, entitled to the exclusive use of the water as it flows through his land. Under the constitution the use of the water is dedicated to the people of the state, subject to appropriation. The riparian owner's right to the use of water does not depend upon user, and is not forfeited by nonuser. The appropriator has no superior right or privilege in respect to the use of water on the ground that he is a riparian owner. His right of use depends solely upon appropriation and user, and he may forfeit such right by abandonment or by nonuser for such length of time as that abandonment may be implied. A riparian proprietor, owning both sides of a running stream, may divert the water therefrom, provided he returns the same to the natural stream before it leaves his own land, so that it may reach the riparian proprietor below without material diminution in quantity, quality, or force. The appropriator, though he may not own the land on either bank of a running stream, may divert the water therefrom, and carry the same whithersoever necessity may require for beneficial use, without returning it, or any of it, to the natural stream, in any manner. The appropriator may, under certain circumstances, change the point of diversion, as well as the

**§ 121. Two distinct systems.**

It will be seen that the legislation, as a whole, in these last-mentioned commonwealths, provides in fact for two distinct systems. One of these is wholly private; permits private owners to appropriate the water of any stream, and to conduct it by a ditch or canal to his own lands. All disputes between two or more appropriators or claimants, under this system, must generally be settled by judicial proceedings, or appropriate actions, in which the priority of the appropriation must determine all questions of priority in right. The other system is public, or at least *quasi* public. It provides for territorial water or irrigation districts, including a community, or space of territory which can be conveniently irrigated by the same supply, drawn from the same source. These districts are under the general control of county governments; have local or district officials, whose powers relate to the location, construction, and maintenance of a system of canals for each district, to the raising of money to defray the expense of their construction and maintenance, to the distribution of water among the landed proprietors in the districts, and other like matters. I shall not, at present, discuss the policy of this legislation.<sup>1</sup> Nor shall I make any attempt to suggest and examine the questions which must arise from the particular provisions of these statutes. Hitherto very few cases have come before the courts involving a judicial interpretation

place of application, of the water. He has a property right in the water lawfully diverted to beneficial use, and may dispose of the same, separate and apart from the land in connection with which the right ripened, to any one who will continue such use without injury to the rights of others. Thus it appears that the constitution has, to a large extent, obliterated the common-law doctrine of riparian

rights, and substituted in lieu thereof the doctrine of appropriation."]

<sup>1</sup> [But it is deemed advisable, in the present edition, in view of the increased interest and the recent legislation on the subject of irrigation and ditch companies and public irrigation districts, to add chapters on these important subjects. See chapters X and XI, *infra*.]

of these legislative systems, and it would be useless to speculate concerning any possible interpretation in the future. It is enough to say that in each of these commonwealths the statutes have covered the whole ground, entirely displacing the common-law doctrines; and the labors of their courts will be confined to the proper construction and application of the statutory rules. Without attempting any further examination of these statutes, which so completely displace the common-law doctrine, I shall confine myself to the law concerning riparian rights, riparian proprietors, and the use of streams flowing through private lands, in the commonwealths which have not adopted these complete statutory systems, and settled all questions of right by legislation. These commonwealths are the states of California and Nevada. [But since our learned author wrote the foregoing, it has become apparent that Nevada is no longer to be included among the states in which the common-law doctrine of riparian rights is recognized and in force.<sup>2</sup> And on the other hand, as was shown in the preceding sections, that doctrine must be regarded as applicable in Oregon,<sup>3</sup> and perhaps also in Washington, though the latter point is doubtful.]

<sup>1</sup>Reno Smelting Works v. Stevenson, 20 Nev. 269, 21 Pac. Rep. 317. .

<sup>2</sup>Hayden v. Long, 8 Oreg. 244.

## CHAPTER VII.

### RIPARIAN RIGHTS ON PRIVATE STREAMS.

#### I. NATURE AND EXTENT OF THESE RIGHTS.

- § 122. Ambiguity of California statutes on water rights.
- 123. Review of the authorities.
- 124. Common-law doctrine of riparian rights obtains in California.
- 125. Construction of section 1422.
- 126. Riparian rights excepted.
- 127. Interpretation of section 1422—*Lux v. Hagg'n*.
- 128. Mexican law—Effect on riparian rights.
- 129. Riparian rights in Kern district.
- 130. Common law of England.
- 131. Who are riparian owners.
- 132. Prescriptive water rights.
- 133. Loss of riparian rights by adverse user and estoppel.

#### II. USES TO WHICH THE WATER MAY BE PUT.

- § 134. General statement of riparian rights—*Van Sickle v. Haines*.
- 135. Modifications on doctrine of *Van Sickle v. Haines*.
- 136. Legitimate riparian uses.
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- 138. Natural uses.
- 139. Secondary uses.
- 140. Reasonable riparian use.
- 141. Reasonable use for manufactures.
- 142. Manner of use must be reasonable.

#### I. NATURE AND EXTENT OF THESE RIGHTS.

#### § 122. Ambiguity of California statutes on water rights.

What is the present condition of the law of California concerning the rights of private owners on the banks of natural streams to use the water of such streams? We have already seen that the Civil Code furnishes what purports to be a system

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of rules determining and regulating the rights of water in all streams, public and private; but that the effect and operation of these rules are rendered at least doubtful, and perhaps nugatory, in their application to streams running through or by private lands, by the final provision, section 1422: "The rights of riparian proprietors are not affected by the provisions of this title." What are the practical consequences, with respect to the whole legislation of the Code, of this restrictive clause? It has been said, by way of answer, that this clause is *not* restrictive, and that it can produce no practical consequence upon the legislation as a whole, because (1) under the law of California, independently of the Code, private "riparian proprietors" have no rights as such to the waters of the adjoining streams; or (2) the "rights of riparian proprietors" intended to be saved and protected are simply those which are not inconsistent with the preceding provisions of the title, and which are not, therefore, taken away by it; those rights, in short, which still remain after and notwithstanding the previous and operative sections of the statutes. Before entering upon any discussion of this most important question, it will be expedient to collect the various judicial authorities bearing upon it, which will aid in its examination.

There seems to be a prevalent opinion that the common-law doctrines concerning "riparian rights" of "riparian proprietors" upon natural streams have no existence whatever in the law of California; that the rights of all private owners of lands bordering upon any stream are wholly subordinate and subject to the right of one who has made a prior appropriation and diversion of its water to any extent for some beneficial purpose; that priority of appropriation and diversion determines the existence, nature, and extent of the rights to the waters of all natural streams among all persons. This opinion is wholly unsupported by judicial authority. It is directly opposed to a long line of decisions and of *dicta* which have, in the clearest manner, both

prior to and since the Codes, recognized the common-law doctrines concerning "riparian rights," and protected "riparian proprietors" in the enjoyment of those rights, to some extent at least, although they have not fully defined those rights, in all their scope and detail. The correctness of this statement will clearly appear from the following citations.

### § 123. Review of the authorities.

In a recent case, which related wholly to the appropriation of the waters of a public stream, the court says: "No question as to the use of the waters of a stream by *riparian proprietors* is presented by this record. There is nothing in the pleadings or findings to indicate that when all the waters of Lytle creek were appropriated, any of the lands by or through which the creek flows had passed into private ownership."<sup>1</sup> The court here expressly recognizes the distinction between the right of appropriating a stream flowing through the public lands, and the right to the use of its waters after any of the lands by or through which it flows have been acquired by private owners. In the recent case of *Ellis v. Tone*<sup>2</sup> the private proprietor of lands bordering on a stream maintained an action and recovered damages for a diversion of the water from the stream, made by the defendant in 1877. The decision recognizes and is based upon the existence of some riparian rights held by the plaintiff as a riparian proprietor on the stream. The opinion, it is true, does not discuss the general doctrine, but is confined to an examination of certain instructions given to the jury at the trial, and the entire charge of the trial judge is not reported. The case, however, is a direct authority for the existence of "riparian rights" under the common-law doctrines, at least to some extent. The decision in *Pope v. Kinman*<sup>3</sup> is unambigu-

<sup>1</sup> *Lytle Creek W. Co. v. Perdew*,  
65 Cal. 447, 2 Pac. Rep. 732.

<sup>2</sup> 58 Cal. 289.

<sup>3</sup> 54 Cal. 3.

ous and express. A stream called "Lytle Creek" rises on public lands, and then flows through private lands, including those of the plaintiff and of the defendants. The plaintiff received the patent to his tract in 1872. The title, or at least the possession, of the defendants was earlier. The defendants had diverted and used all the water of the creek, and claimed the exclusive right to do so. The plaintiff brought this action in 1877 to quiet his title to the use of the water as a riparian owner, and to restrain the defendants' diversion. The court, after holding that the plaintiff's action was not barred by the statute of limitations, says: "The principal question is whether it is competent for the defendants, by the mere diversion of the waters of Lytle creek, which is an innavigable stream flowing across the lands of the plaintiff, to deprive the plaintiff of all interest or right of any nature in the waters of that creek. *As being owner of the land, the plaintiff has an interest in the living stream of water flowing over the land; his interest is that called the 'riparian right.'*" It is not necessary in this case to define in detail the precise extent of the riparian rights as existing in this country; it is enough to say that under settled principles, both of the civil and the common law, the *riparian proprietor has a usufruct in the stream* as it passes over his land. The judgment of the court below deprived the plaintiff of that usufruct, and declares in terms 'that plaintiff has no right, title, nor interest in said waters or any portion of them.' The judgment of the court below is therefore modified so as to read as follows: (1) That defendants have nothing as against the plaintiff, except only such rights as any of them may have of like character with that of the plaintiff, as being riparian proprietors of land bordering on said stream; and (2) that none of defendants have any right, title, or interest in or to the waters of said creek except as riparian proprietors as aforesaid."

The rights of a "riparian proprietor" were also admitted and

protected in the case of *Creighton v. Evans*.<sup>1</sup> The court said: "It is admitted that the waters of Elk bayou flowed in its natural channel through plaintiff's land, and that defendant diverted a portion of the water to his own land for purpose of irrigation, and other purposes. It is not averred that he is a riparian owner, and as such entitled to use any portion of said water. The court properly instructed the jury that plaintiff was entitled to recover at least nominal damages, even though he had suffered no actual damages. But the court further instructed the jury that if defendant diverted a portion of the water for a useful purpose, and that enough water was left in the stream for the use of the plaintiff for watering his stock and for domestic purposes, and if the plaintiff was not damaged by the diversion, the verdict should be for the defendant. This was not only contradictory to the first instruction, but was erroneous as matter of law. So far as appears on the record, defendant was not entitled to divert the water for any purpose, and plaintiff was entitled to at least nominal damages." This case was decided in 1878, but the report does not show when the cause of action arose. Several cases concerning the interference with or use of subterranean water, whether percolating through the soil or flowing in defined streams, also recognize and are decided in accordance with the settled common-law rules on that subject.<sup>2</sup>

In the case of *Ferrea v. Knipe*<sup>3</sup> the rights of riparian proprietors were not only recognized, but their extent was also partially defined. The controversy was between two owners upon the same stream. The defendant, for the alleged purpose of securing the water for the use of watering his stock, and for domestic purposes, had erected a dam, which collected the whole water

<sup>1</sup>53 Cal. 55.

<sup>2</sup>See *Hale v. McLea*, 53 Cal. 578; *Huston v. Leach*, Id. 262; *Hanson v. McCue*, 42 Cal. 303; *Mosier v.*

*Caldwell*, 7 Nev. 363; *Strait v. Brown*, 16 Nev. 317.

<sup>3</sup>28 Cal. 341.



of the stream in a pond, and prevented any of it from flowing down to the plaintiff's lands below. An action for damages and preventive relief was sustained. Currey, J., delivering the opinion of the court, said, (page 344:) "Every proprietor of the land through or adjoining which a water-course passes has a right to a reasonable use of the water, but he has no right to so appropriate it as to unnecessarily diminish the quantity of its natural flow. The use of the water of a stream for domestic purposes and for watering cattle necessarily diminishes the volume of the stream. This is unavoidable, and though, by reason of such diminution, a proprietor on the stream below fails to receive a supply commensurate with his wants, he is without remedy, because his right subsists subject to the rightful use of the water by his neighbor on the stream above him. But while admitting that a riparian owner, to whom the water first comes in its flow has the right to use it for domestic purposes, and for watering his cattle, it is proper to observe that he has not the right to so obstruct the stream as to prevent the running of water substantially as in a state of nature it was accustomed to run. \* \* \*" Page 345: "Though the defendant had the right to use the stream for watering his cattle, and for household purposes, he had not the right, under the circumstances, to dam up the creek, and spread out the water over a large surface, by which it would become lost by absorption and evaporation to an extent to prevent the stream from flowing to the plaintiff's premises; as it would have done had it not been for the defendant's dams. This was not a proper and beneficial use of the stream."

In the case of *Hill v. Smith*,<sup>1</sup> Mr. C. J. Sanderson announced the principle which underlies the common-law doctrines as still forming a part of the California jurisprudence, (page 482.) Speaking of certain erroneous views, he says: "This is due in

<sup>1</sup>27 Cal. 475.

a great measure, doubtless, to the notion, which has become quite prevalent, that the rules of the common law touching water rights have been materially modified in this state, upon the theory that they were inapplicable to the conditions found to exist here, and therefore inadequate to a just and fair determination of controversies touching such rights. *This notion is without any substantial foundation.* The reasons which constitute the ground-work of the common law upon this subject remain undisturbed. The maxim, '*sic utere tuo ut alienum non lædas,*' upon which they are grounded, has lost none of its force. When the law declares that a riparian proprietor is entitled to have the water of a stream flow in its natural channel,—*ubi currere solebat*,—without diminution or alteration, it does so because its flow imparts fertility to his land, and because the water in its pure state is indispensable for domestic uses. But this rule is not applicable to miners and ditch-owners, simply because the conditions upon which it is founded do not exist in their case." The court went on further to hold that the common-law doctrines still regulated the right to the use of water in mining regions as far as the conditions of the situation and business would allow.

In the early and leading case of *Crandall v. Woods*,<sup>1</sup> which did not relate to the use of water for mining or other special uses, nor to the prior appropriation of water flowing in a public stream, discussed in the former portion of this article, the same general common-law doctrine was affirmed. The controversy arose between two proprietors who held different tracts of the public land upon the same stream, by a possessory right good against all third persons, but who had not yet obtained the legal title from the United States by patent or otherwise. The question was whether one of these parties could divert the water of the stream, and prevent it from flowing by or through the land

<sup>1</sup>8 Cal. 136.

of the other, who had acquired his possessory right before any such diversion was made. This question was answered in the negative, although the possession of the one making the diversion was prior to that of the other party who complained of the diversion. Holding that possession of public land carries with it the privileges and incidents of ownership against every one but the government, the court further held, as a necessary consequence, that such possession gives the right to the use of water flowing through the land for its natural wants, but does not confer the right to divert it, and to prevent its running upon the land of another who has taken up the same subsequently, but before the attempt to change the course of the water. The opinion of the court, by Mr. C. J. Murray, uses the following language, (page 141:)

“The property in the water, by reason of riparian ownership, is in the nature of a usufruct, and consists, in general, not so much in the fluid as in the advantage of its impetus. This, however, must depend upon the natural as well as the artificial wants of each particular country. The rule is well settled that water flows in its natural channels, and should be permitted thus to flow, *so that all through whose land it passes may enjoy the privilege of using.* A riparian proprietor, while he has the undoubted right to use the water flowing over his land, must so use it as to do the least possible harm to other riparian proprietors. The uses to which water may be appropriated are, first, to supply *natural* wants, such as to quench thirst, to water cattle, for household and culinary purposes, and, in some countries, for the purpose of irrigation. [In no country where the common-law doctrines alone govern, is the purpose of irrigation placed upon the same footing with those other purposes and uses mentioned by Mr. Justice Murray.] These must be first supplied, before the water can be applied to the satisfaction of artificial wants, such as mills, manufactories, and the like, which

are not indispensable to man's existence. [The necessary limitations to be placed upon this *dictum* will be described in the sequel.] Water is regarded as an incident to the soil, the use of which passes with the ownership thereof. As a general rule, a property in water *cannot be acquired by appropriation, but only by grant or prescription.*" This decision and the opinion quoted refer to a condition of circumstances completely analogous with private *ownership* of lands on the banks of a stream. The appropriation of water from public streams for mining and other purposes, in pursuance of local customs and rules sanctioned by the act of congress, and the special condition of the mining regions, are not involved nor affected by the reasoning or the decision. The common-law doctrine here applied to private riparian proprietors who have only *possessory* titles or occupation rights to land bordering on streams, must *a fortiori* extend to those riparian proprietors who have obtained complete legal titles and ownership over such lands. The same doctrine was affirmed in *Leigh v. Independent Ditch Co.*<sup>1</sup> In an action for the diversion of water, the complaint alleged that the plaintiffs were owners and possessors of a certain mining claim situated on a certain stream, and were entitled to have the waters thereof flow as they naturally did, but defendants had diverted them. The defendants demurred to this complaint on the ground that it stated no cause of action, because it did not allege that plaintiffs had appropriated the water, or were owners of it, or were in possession of it. The demurrer was overruled. "The allegation that the plaintiffs were owners and in possession of the mining claim was sufficient. The ownership and possession of the claim drew to them the right to the use of the water flowing in the natural channel of the stream. The diversion of the water was therefore an injury to the plaintiffs for which they could sue. The princi-

<sup>1</sup>8 Cal. 323.

ple involved in this case was expressly decided by this court in the case of *Crandall v. Woods*.” The court here expressly decided that a riparian proprietor, merely by virtue of his ownership, is entitled to the use of the water without making any actual appropriation. The common-law doctrine, that the right over the stream arises from riparian ownership, and not from any appropriation, is again declared. It is true the land in this case was a mining claim, but the decision was not in the slightest based upon or affected by that fact. In the state of Nevada, the common-law doctrines concerning the riparian rights of private riparian proprietors have been adopted in the most explicit manner by the well-considered decision of the supreme court in the case of *Van Sickle v. Haines*.<sup>1</sup> The court held that a person acquiring the legal title by patent from the United States, to a tract of land bordering on a stream, obtained as a necessary incident of his ownership, and before making any actual appropriation, full right to the water of the stream as a riparian proprietor, superior and complete as against another party, not a riparian owner, who had made a prior appropriation of the waters of the stream while it was entirely public. Extracts from the very able and instructive opinion in this case will be given under a subsequent head.

#### § 124. Common-law doctrine of riparian rights obtains in California.

The foregoing series of cases shows, beyond a possibility of question or doubt, that prior to and since the adoption of the Civil Code, the laws of California recognized, protected, and enforced the rights known as the “riparian rights” of private “riparian proprietors” owning lands situated on the banks of natural streams, substantially as they exist at the common law.

<sup>1</sup> 7 Nev. 249. But compare *Reno Smelting Works v. Stevenson*, 20 Nev. 269, 21 Pac. Rep. 317.

The rights thus known as "riparian rights" have been defined;<sup>1</sup> they belong alike and equally to all "riparian proprietors" on the same stream, subject solely to the natural advantage belonging to the upper over the lower proprietor;<sup>2</sup> they exist as a necessary incident of ownership, even though the proprietors had not as yet made any actual appropriation or diversion of the water;<sup>3</sup> they entitle each "riparian proprietor" to the usufruct of the water as it flows in the natural channel of the stream, including the right to use so much of it as may be reasonably necessary for such primary purposes as watering his cattle, domestic and household uses, without thereby unnecessarily or unreasonably diminishing its natural flow down to the proprietors below him on the stream.<sup>4</sup> Whether these riparian rights include the right to use the water for purposes of irrigation is not directly decided, nor even considered, by these cases.

We are thus furnished with a conclusive answer to a question suggested on a preceding page. I had stated the position maintained by some, that the section 1422 of the Civil Code is *not* in reality restrictive, and can produce *no* practical effect upon the whole legislation of the Code concerning water rights for two reasons; the first of these being that, under the law of California, independently of the Code, private "riparian proprietors" have no rights as such to the waters of the adjoining stream. The series of decisions above quoted demonstrates the incorrectness of this opinion. These authorities show most clearly that the law of California, independently of the Code, did and does recognize the "riparian rights" of "riparian proprietors" substantially as they exist at the common-law. This conclusion is so certain that no further discussion can render it any more plain.

<sup>1</sup>Pope v. Kinman, 54 Cal. 3.

<sup>2</sup>Id.; Ferrea v. Knipe, 28 Cal. 341; Crandall v. Woods, 8 Cal. 136.

<sup>3</sup>Creighton v. Evans, 53 Cal. 55.

<sup>4</sup>Pope v. Kinman, Creighton v.

Evans, Ferrea v. Knipe, Crandall v. Woods, *supra*. And see Paige v. Rocky Ford Canal Co., 83 Cal. 84, 23 Pac. Rep. 875.

The legislature, in enacting section 1422, clearly assumed that the then existing law of the state recognized and protected these "riparian rights" of "riparian proprietors."

### § 125. Construction of section 1422.

We are then brought back to a consideration of the question: What are the practical effects, upon the entire legislation of the Code, of the restrictive provision contained in section 1422? In support of the position maintained by some, that this clause is *not* restrictive, and can produce no practical effects upon the legislation as a whole, a second ground has been advanced, namely, that the "rights of riparian proprietors" intended to be saved and protected by the section are simply those which are not inconsistent with the previous sections of the title, and which are not, therefore, taken away and abrogated by these provisions; those rights, in short, which still remain in force after and notwithstanding the preceding and operative sections of the statute. Is this the interpretation which should properly be given to the language of section 1422? In my opinion it is not. Such an interpretation would, in my opinion, be unreasonably forced, and in plain violation of the settled rules governing the construction and interpretation of statutes. In the first place, it is a fundamental doctrine of statutory interpretation that in every distinct, clear, additional provision the legislature must be assumed to *have meant something*; to have intended the provision to have *some* meaning, operation, and effect, so that it is not wholly superfluous, useless, and nugatory. Nothing but absolute necessity, therefore, should ever admit such an interpretation of a clear, distinct, and positive provision as would render it unnecessary, useless, superfluous, and nugatory.

The suggested construction of section 1422 would render the whole clause utterly useless, superfluous, and nugatory. If it were adopted, the section would in effect read: "The rights of

riparian proprietors, so far as they are not taken away or abrogated by the provisions of this title, are not affected by the provisions of this title." It cannot be supposed that the legislature would deliberately, and by a formal and final section placed at the end of a statute, enact a provision so unnecessary and meaningless. Whatever may have been the riparian rights existing previous to the statute, then, as a matter of course, so far as they were not opposed to the provisions of the statute, so far as they were not taken away, abrogated, lessened, or altered by the statute, they would necessarily remain unaffected by its provisions. It needs no express clause to produce this result, which would be inevitable in the absence of such a clause; no clause could make the consequence any more certain or operative. We find the title of the Code concluded by a formal, peremptory, and sweeping final section in the nature of a proviso or limitation upon the operation of the statute as a whole, and it is simply absurd to suppose that the legislature intended by this section nothing but what would have been equally true if the section had been omitted. The correctness of this conclusion will appear even still more clear from a further consideration. The interpretation which I am examining would render section 1422 wholly without meaning, effect, and operation. If the "rights of riparian proprietors" intended to be protected are simply those which are not inconsistent with the previous sections of the title, which are not abrogated, but which still remain notwithstanding the preceding provisions of the statute, then, I say, this section 1422 is utterly useless, and without any force and effect, because there *are no such* "rights of riparian proprietors" remaining unaffected by the title. If the previous provisions of this title are operative to their full extent, unlimited and unrestricted by the final section, then they must inevitably abolish and abrogate all the "riparian rights," and "rights of riparian proprietors," existing at the common law. The

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fundamental conception upon which all of the common-law rules are based, and all and singular of the special "riparian rights," and rights of "riparian proprietors" created and regulated by these common-law rules, are alike inconsistent with and opposed to the provisions of this title of the Code, if these are to have their full and natural meaning and operation, unrestricted by the proviso contained in the final section 1422. And, furthermore, the interpretation in question seems to have been, impliedly, at least, condemned by recent decisions of the supreme court. In several of the cases above quoted, the causes of action arose since the title of the Civil Code concerning water rights went into effect. Under the construction which it is claimed should be given to section 1422, the provisions of this title would have been a complete answer to the plaintiff's contention in all of these cases, and would have absolutely controlled their decision. And yet in none of these cases is the title of the Code even suggested or referred to by the court. It is not too much to say that these cases are wholly inconsistent with any interpretation of section 1422, which leaves the preceding provisions of this title fully operative, according to their natural and literal import, upon the rights of private riparian proprietors.<sup>1</sup>

### § 126. Riparian rights excepted.

The conclusion, then, seems to be irresistible that the legislature intended section 1422 to have *some* meaning and effect; that they designed it to be a material and substantial limitation upon the otherwise general operation of the preceding clauses of

<sup>1</sup>See *Ellis v. Tone*, 58 Cal. 289; *Pope v. Kinman*, 54 Cal. 3; and in other reported cases decided since the Code took effect, but which do not show when the causes of action arose, some reference to this title of the Code

would certainly have been made, if it had the effect to abrogate all riparian rights. See *Creighton v. Evans*, 53 Cal. 55; *Lytle Creek Water Co. v. Perdew*, 65 Cal. 447, 2 Pac. Rep. 732.

the title. What are its meaning and its effect? A fair and reasonable construction seems to leave no other alternative but that the section must have all the meaning, force, and effect which can result from the full, settled, and legal import of all its terms, considered as referring to and acting upon the then existing doctrines of the law established by judicial decisions. In other words, the common-law "riparian rights" of private "riparian proprietors" owning tracts of land upon the margins of natural streams in this state, which have been recognized, declared, and maintained by judicial decisions both before and since the Code, are not affected by the title of the Code; do not, in fact, come within the purview of its provisions. In short, the whole title has no relation to, nor effect upon, the rights of those private owners who hold tracts of land bordering upon natural streams, but is confined in its operation to the rights of appropriating and using the waters of streams which flow wholly through public lands of the United States or of the state. There seems to be no escape from this construction unless an entirely different meaning is to be given to the words "rights of riparian proprietors" when found in a statute, from that given by the universal consent of all judicial decisions.

The supreme court has uniformly recognized and maintained the distinction between the common right of all persons to appropriate the water of streams while running wholly through public lands, and the rights of private riparian owners who have acquired private titles to lands on the banks of streams. It has recognized the technical terms "riparian rights" and "riparian proprietors," and has defined them as they have been defined and are understood at the common law. The doctrines decided by the supreme court concerning these "riparian rights" have been summarized on a previous page, and need not be here repeated.<sup>1</sup> There can be no reasonable doubt that these "ri-

<sup>1</sup> See *ante*, § 109.

parian rights" of private owners on the banks of streams are referred to by section 1422, are excepted or removed by it from the meaning and operation of the whole title, and are left existing in the law of California as fully and completely as they were before the Code. The title of the Code thus finds its sole application to the water of streams flowing entirely through public lands, upon the banks of which no private owner has yet acquired title to any tract or parcel of private land.

If it be urged that this construction virtually emasculates the entire title of the Code concerning water rights, and renders it virtually inoperative over a large and most important branch of those rights, the answer is that this is the fault of the legislation, and not of the construction. It is the duty of courts to take statutes as they are, to expound them according to the plain and natural import of their terms, and not to add to or take from them according to any notions which the judges may have as to what the legislature *ought* to have enacted. In the title of the Code under consideration the legislature has undoubtedly shirked its responsibility. Called upon to settle a question of the gravest importance, in which there are directly opposing interests involved, any settlement of which must necessarily be hostile to some large pecuniary interests, the legislature, under a mere appearance,—a *simulacrum* of settlement,—has, in fact, done nothing, but has left all the important questions of private water rights of private riparian owners in exactly the same position which they occupied prior to the Code. The failure of the legislature to do what it was supposed and desired by some it should do, can have no effect upon the action of the courts in construing and interpreting the statute as a whole. The court cannot enact a new and different statute.

### § 127. Interpretation of section 1422 — *Lux v. Haggin*.

[The views advanced by our author in the preceding sections have received the sanction of the highest court of California, and are thus in harmony with the authoritative interpretation of this obscure and ambiguous statute. In the case of *Lux v. Haggin*,<sup>1</sup> decided in 1884, it was said by Sharpstein, J.: "After carefully examining all the cases bearing on this question, we are unable to find one in which it is held, or even suggested, that outside of the mining districts the common-law doctrine of riparian rights does not apply with the same force and effect in this state as elsewhere." And the reason why it did not apply to the mining districts is "that the government, being the owner of all the land through which a stream of water runs, had a right to permit the diversion and use of it by any one who chose to divert and use it for mining, agricultural, or other purposes. There is not only no occasion for the application of the doctrine of riparian proprietorship in such a case, but it is one to which the doctrine could not be applied." The court continued: "The provisions of the Civil Code in respect to the appropriation of water must be limited to that which flows over lands owned by this state or by the United States. It cannot affect the rights of riparian proprietors, (1) because it is expressly declared that it shall not; and (2) because an owner of land cannot be divested of any interest which he has acquired in it except for a public use, and not then until just compensation has been made for it."<sup>2</sup>

<sup>1</sup> 69 Cal. 255, 4 Pac. Rep. 919, 923.

<sup>2</sup> In this case a dissenting opinion was delivered by Ross, J., in which he said: "Of course the doctrine of appropriation, as contradistinguished to that of riparian rights, was not intended to, and in-

deed could not, affect the rights of those persons holding under grants from the Spanish or Mexican government—*First*, because the doctrine is expressly limited to the waters upon what are known as the public lands; and, *secondly*, be-

This case was reargued in 1886; and the opinion then prepared is so exhaustive in its scope, and is characterized by such learning and judicial acumen, that it may almost be said to constitute, in itself, a complete treatise on water rights. In regard to the point now under consideration, it was held that the water rights of the *state*, as riparian owner, are not reserved by section 1422 of the Code, because (whenever the state has not already parted with its right to those who have acquired from it a legal or equitable title to riparian lands) the provisions of the Code confer the state's right to the flow on those appropriating water in the manner prescribed by the Code.<sup>1</sup> Further, it was suggested in argument that the "riparian rights" designed to be reserved by section 1422 were such only as had become vested before the Code went into operation, and that, after that date, no genuine riparian rights could be acquired in California. But the court held that the section in question is protective, not only of riparian rights existing when the Code was adopted, but also of the riparian rights of those who had acquired a title to land from the state after the adoption of the Code, and before an appropriation of water in accordance with the Code provisions. This decision was made to rest upon a point not previously considered in any of the cases, but one of such importance and so clear that it seems to terminate the whole controversy. To quote the language of McKinstry, J.: "We do not find it necessary to say that the prospective provisions of the Code would violate the obligation of a contract; but, when the state is prohibited

cause the rights of such grantees are protected by the treaty with Mexico and the good faith of the government. It is the rights of such riparian proprietors as *those* that are unaffected by the doctrine of appropriation, and *those* are the riparian rights that are excepted from the operation of the provis-

ions of the Civil Code, in relation to water-rights, by section 1422 of that Code." *Lux v. Haggin*, 69 Cal. 255, 4 Pac. Rep. 919, 935. But this view cannot be regarded as tenable.

<sup>1</sup>*Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 739.

from interfering with the primary disposal of the public lands of the United States, there is included a prohibition of any attempt on the part of the state to preclude the United States from transferring to its grantees its full and complete title to the land granted, with all its incidents. The same rule must apply to homesteaders, pre-emptioners, and other purchasers under the laws of the United States. To say that hereafter the purchaser from the United States shall not take any interest in the water flowing to, or in the trees on, or in the mines beneath, the surface, but others of our citizens shall have the privilege of removing all these things, is to say that hereafter the United States shall not sell the water, wood, or ores." The learned judge continued: "The section declares, in effect, that those appropriating water under the previous sections shall not acquire the right to deprive of the flow of the stream those who shall have obtained from the state a title to, or right of possession in, riparian lands, before proceedings leading to appropriation shall be taken. Such is the meaning of the words employed. Our conclusion on this branch of the case is that section 1422 saves and protects the riparian rights of all those who, under the land laws of the state, shall have acquired from the state the right of possession to a tract of riparian land prior to the initiation of proceedings to appropriate water in accordance with the provisions of the Code. If section 1422 of the Civil Code were interpreted as saving *all* riparian rights actually vested before the section took effect, the mere appropriator could acquire no rights to water by virtue of the provisions of the Code, but would be left to the enjoyment of such as he might secure by convention with the riparian proprietors. If all riparian rights existing when the section was adopted were preserved by section 1422, then, inasmuch as both the state and the United States were at that time riparian owners, the lands of neither government would be affected relating to water rights; nor, of course, would any

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subsequent grantee of either government be affected by those provisions."<sup>1</sup>

The common law, therefore, defines and governs the water-rights of all persons owning lands upon a stream in California, where the waters of such stream had not been already appropriated when their titles accrued.]

### § 128. Mexican law—Effect on riparian rights.

[The recognition and enforcement of the common law doctrine of riparian rights, by the legislation and in the courts of California, is not in anywise affected or invalidated by the fact that the laws of Mexico obtained in that jurisdiction before its admission as a state into the Union. If, under the Mexican *regime*, vested rights of property had grown up, of such a nature and to such an extent that the general enactment of the law of riparian proprietorship would have been inconsistent with their continued enjoyment, it is obvious that California would have had no power to destroy these rights by the adoption of the common law, or by its legislation on the subject of waters. But, on the contrary, the Mexican law, as it existed at the time of the cession of California, did not confer nor recognize any inherent vested right, enforceable in the courts, in others than riparian proprietors, to the use of any portion of the waters of a stream, nor any right, except as to those who actually appropriated waters in the manner and on the conditions prescribed by the laws.

This subject was very fully discussed in the recent important case of *Lux v. Haggin*,<sup>2</sup> where the conclusion above indicated was reached and applied. It was contended by counsel that "the fundamental principle upon which all the laws of the former governments of this territory upon this subject [waters and their uses] were based will be found to be that the flowing wa-

<sup>1</sup> *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 674.

<sup>2</sup> *Id.*

ters of the streams and rivers of the country were dedicated to the common use of the inhabitants, subject to that legislative control which is the equivalent of the exercise of that legislative power which we know as the 'police power' of the state." And the court understood this proposition to mean that "the inhabitants" of the territory, or at least the occupants of lands in each valley or water-shed capable of irrigation from a stream flowing in it, had, under the Mexican law, a vested interest in the common use, for irrigation and like purposes, to which the waters were "dedicated," which could not be taken away by the legislative power; that the dedication continues to the present hour; that the state of California has no power to restrict the use to riparian proprietors; that the statute of 1850, adopting the common law as the rule of decision, is not to be construed as an attempt so to restrict the use; and, if it must be thus construed, it is invalid to that extent, since the power of the state is limited to the mere *regulation* of the common use. But the court denied the view contended for, and announced the principle that, "by the law of Mexico, the running waters of California were not dedicated to the common use of all the inhabitants in such sense that they could not be deprived of the common use."

This doctrine was supported upon substantially the following reasoning: By the Roman law, three things, viz., air, running water, and the sea, (with its shores,) were considered as common to all. But the Roman jurists made a distinction between *res communes* and *res publicæ*, including the sea among the former and rivers among the latter. The same distinction was recognized by the Spanish writers,—*bienes comunes* being those which, not being, as to ownership, the property of any, pertain to all as to their use,—as the air, rain, water, the sea, and its beaches; and *bienes públicos* being those which, as to property, pertain to a people or nation, and, as to their use, to all the individuals of the territory or district,—such as rivers, shores,



ports, and public roads. And by the Mexican law the property in rivers pertained to the nation; the use, to the inhabitants. Now, whatever the common use to which rivers, harbors, and public roads were subjected, the enjoyment of such use would exclude the notion of an exclusive use or occupation which must interfere with a like use by others. But the common use of rivers would seem to be such as all could enjoy who had access to them *as rivers*. An eminent English judge speaks of a distinction mentioned by the civilians between a river and its waters; the former being, as it were, a perpetual body, and under the dominion of those in whose territory it is contained; the latter continually changing, and incapable, while it is there, of becoming the subject of property; and he adds: "It seems that the Roman law considered running water not as a *bonum vacans*, in which any might acquire a property, but as public or common, in this sense only, that all might drink it, or apply it to the necessary purposes of supporting life; and that no one had any property in the water itself, except in that particular portion which he might have abstracted from the stream, and of which he had the possession, and during the time of such possession only."<sup>1</sup> The common use of the waters, it would seem, existed only while they continued to flow in, and constituted a portion of, the river; but under the Mexican law an exclusive use of parts or the whole of the waters of a river might be legally acquired by individuals. By the Mexican Civil Code of 1870 it is provided: "The property in waters which pertains to the state does not prejudice the rights which corporations or private individuals may have acquired over them by legitimate title, according to what is established in the special laws respecting public property. The exercise of property in waters is subject to what is provided in the following acts." Article 1066. If, as is probable, the presumption is that the provisions of the

<sup>1</sup>Denman, J., in *Mason v. Hill*, 5 Barn. & Adol. 1.

Code are declaratory of the pre-existing law, the right which could be acquired under the laws to the separate use of the portions of a stream constituted an exclusive usufruct, of the nature of private property, which did not and could not co-exist with a common use of such waters by all.<sup>1</sup> The court then continued: "It was the policy of Mexico to foster and protect navigation. The rivers naturally adapted to the passage of watercraft were devoted to the common use for purposes of navigation. It would seem to be in the *power* of the sovereign (except so far as the power is limited by the constitution of government) to authorize such diversions as shall interfere with navigation. It was never doubted that an act of parliament would operate to extinguish any public right to passage. Woolr. Waters, 289. While, however, a river remained a navigable river, the navigation was, by the civil law, common to all, unless the privilege was limited to a class. Interference with the appropriate use of innavigable rivers was not thus absolutely prohibited by the Mexican law. The common use of the waters of such rivers by all who could legally gain access to them continued only while the waters legally flowed in their natural channel, and the power of determining whether the public good—the purposes for which the social state exists—demands that the use of the whole or portions of the waters should pass as an exclusive right to one or a class of individuals remained in the sovereign. Whether the power is an incident to the ultimate domain or right of disposing of the property of the state, or is to be referred to some other source or principle, the Mexican government employed the power of permitting the diversion of waters from innavigable streams, by those not riparian proprietors, upon

<sup>1</sup> Among the authorities cited by the court are the following: 2 Just. Inst. 1, §§ 1, 2; Hal. Int. Law, 147; Moyle, Just. 184; Escriche; Hall, Mex. Law, 447; Vinnius,

Comm. Inst.; Mason v. Hill, 5 Barn. & Adol. 1; Bow. Mod. Civil Law, 64; Mex. Civil Code, art. 1066. See, also, Sand. Just. 157, 159.

such terms and conditions, and with such limitations, as were established by law, or by usages and customs which had the force of law. That government saw fit to concede private rights to the exclusive use of the waters of such streams. It had *power* to do this, even if the consequence should be the entire deprivation of the common use. It may be said that the Mexican laws which provided for such concessions to individuals or corporations did not provide for *grants* to such persons, but were themselves a recognition of a right in all to a use of the waters. But a system which provided for the mode of acquisition of private, separate, and exclusive rights by individuals or corporations cannot be said to be merely in regulation of a common use. Those who appropriated and diverted the waters of an innavigable river in accordance with the laws, obstructed *pro tanto* its common use. Nevertheless they acquired an exclusive right to the use of that which they diverted, because, if they complied with the established conditions, their rights were acquired under and in accordance with law, and the waters they diverted were no longer portions of the waters of a river, or subject to the common use. No one of such had any right in or to the water until he had complied with the conditions which authorized him to appropriate it. Every one of such who complied with the conditions, and appropriated water, acquired a vested right in such water, at least while he continued to use it, except in the single case where he acquired a right merely conditional, under laws which reserved the power in the agents of the state or municipality to deprive him of it without indemnification."<sup>1</sup>]

### § 129. Riparian rights in Kern district.

[We have shown that the common law regulates the rights of riparian owners on the rivers and streams of California, un-

<sup>1</sup>Lux v. Haggin, 69 Cal. 255, 10 Pac. Rep. 705-711.

affected by the provisions of the Civil Code. It is also held that the common law as to riparian rights was not abrogated by certain statutes of the state applicable to a district of country within which is included the county of Kern, nor was the state estopped by such statutes from asserting its right to the flow of a natural stream from that district to and over the lands granted to the state by the act of congress of 1850.<sup>1</sup>]

### § 130. Common law of England.

[The rights of riparian owners in California are to be determined by the common law, because these rights are excepted from the operation of the Code, and because the common law was adopted as the rule of decision in that state by the act of April 13, 1850. This statute, it is held, adopts the common law of England, not the civil law, nor the "ancient common law" of the civilians, nor the Mexican law, nor any hybrid system. And in ascertaining the common law of England, say the court, "we may and should examine and weigh the reasoning of the decisions, not only of the English courts, but also of the courts of the United States, and of the several states, down to the present time." "The report of the proceedings of the legislature shows that there was a considerable minority in favor of the adoption of the civil law; and there are circumstances appearing from the proceedings tending to prove that the advantages of each system, as the fundamental law of the future, were discussed and fully considered. Under these circumstances, we must believe that, if it had been intended to exclude the common law as to the riparian right, the intention would have been expressed. Moreover, it is a well-established principle that, when the legislature of this state has enacted a statute like one previously existing in other states, the courts here may look to

<sup>1</sup>Lux v. Haggin, 69 Cal. 255, 10 Pac. Rep. 735.

the interpretation of such statute by the courts of the other states."<sup>1</sup>]

### § 131. Who are riparian owners.

[Where a party has a contract for the purchase of lands adjoining a river, upon conditions not yet fulfilled by him, he has not yet acquired the fee, and cannot invoke the doctrine of riparian rights in his favor.<sup>2</sup> But one who, though not a riparian owner, derives his right to the use of running water from a riparian proprietor, may restrain an interference with such right by an upper riparian proprietor who uses the water for purposes not riparian.<sup>3</sup> So where adjoining land-owners agree that the waters of a certain stream be taken to a reservoir on the land of one of them, and that the other shall conduct half of the water through ditches to his land, these are covenants that run with the land, and the successor of either party has no right to go to a point higher up than where the stream reaches their adjoining lands, and convey the water to his land by some different means, and claim the whole of it for his own use.<sup>4</sup> But it is held that a mere *intruder* on land is limited to his actual possession, and the rights of a riparian proprietor do not attach to him.<sup>5</sup> And so also, a mere possessor of unsurveyed government land has no riparian rights to the use of a stream of water flowing through it.<sup>6</sup>]

### § 132. Prescriptive water rights.

[While the common law recognizes no such thing as an exclusive right acquired by mere priority of appropriation of wa-

<sup>1</sup> *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 746, 749.

<sup>2</sup> *Smith v. Logan*, 18 Nev. 149, s. c. 1 Pac. Rep. 678.

<sup>3</sup> *Williams v. Wadsworth*, 51 Conn. 277.

<sup>4</sup> *Weill v. Baldwin*, 64 Cal. 476, s. c. 2 Pac. Rep. 249.

<sup>5</sup> *Watkins v. Holman*, 16 Pet. 25.

<sup>6</sup> *Lake v. Tolles*, 8 Nev. 285.

ter, it must be remembered that the riparian owner may obtain exclusive interests in the stream by grant or by prescription. In regard to the last named it is said: "The right acquired by prescription is only commensurate with the right enjoyed. The extent of the enjoyment measures the extent of the right. The right gained by prescription is always confined to the right as exercised for the full period of time required by the statute, which is, in this state, five years. A party claiming a prescriptive right for five years, who, within that time, enlarges the use, cannot, at the end of that time, claim the use as enlarged within that period."<sup>1</sup> The owner of a mill-dam cannot acquire a right by prescription to overflow adjoining lands while they belong to the United States or to the state.<sup>2</sup> And so, if a party has acquired by prescription a right to divert water so that it flows into a creek running through his neighbor's land, such prescriptive right does not extend to the overflowing of the water over such land to the neighbor's injury.<sup>3</sup> Where a riparian owner has used the waters of a stream for the purpose of irrigation, and has acquired a prescriptive right thereby, a lower riparian proprietor cannot obtain an injunction restraining his so doing on the ground that the diversion of the water has become injurious through a gradual diminution in the natural volume of the stream.<sup>4</sup> But the right to the exclusive use of the water of a stream for irrigating purposes cannot be acquired by adverse possession, where, during the time in which such prescriptive right is claimed to have accrued, there has been an abundant supply of water in the stream for all claimants.<sup>5</sup> In Maine, it is

<sup>1</sup> *Boynton v. Longley*, 19 Nev. 69, 6 Pac. Rep. 437, Hawley, J.

<sup>2</sup> *Wattier v. Miller*, 11 Or. 329, s. c. 8 Pac. Rep. 354.

<sup>3</sup> *Tucker v. Salem Flouring-Mills Co.*, 13 Or. 28, s. c. 7 Pac. Rep. 53.

<sup>4</sup> *Messinger's Appeal*, 109 Pa. St. 285, 4 Atl. Rep. 162.

<sup>5</sup> *Anaheim Water Co. v. Semitropic Water Co.*, 64 Cal. 185, 30 Pac. Rep. 623.

said that a right to the *artificial* flow of water through a water-course may be acquired by prescription.<sup>1</sup> And this seems also to be the doctrine of the Pacific states.<sup>2]</sup>

**§ 133. Loss of riparian rights by adverse user and estoppel.**

[In the preceding section we saw that while a riparian owner, merely as such, has no right to the exclusive use of the stream, he may acquire such a right by grant or prescription. It now remains to be stated that the converse of this rule is equally of force; that is, that the rights attaching to the estate of a riparian owner, in virtue of such ownership, may be lost or forfeited by the exclusive adverse use of the stream by another person, continued for a sufficient length of time, or on the grounds of equitable estoppel. Thus, an adverse, exclusive, and uninterrupted use and enjoyment by one person and those under whom he claims, of all the waters of a stream, taken therefrom by means of a ditch, and conveyed to certain mining grounds for mining purposes, for a period beyond that of the statute of limitations prescribing the time within which entry shall be made upon real property, will bar the owner of the land through which the stream runs of his riparian rights.<sup>3</sup>

But here it is necessary to distinguish between the acquisition of water rights by prescription and the statutory appropriation of such rights under the system explained in the earlier parts of this work. In those states where the

<sup>1</sup>Murchie v. Gates, 78 Me. 304, 4 Atl. Rep. 698; Dority v. Dunning, 78 Me. 681, 6 Atl. Rep. 6.

<sup>2</sup>Trambley v. Luterma, (N. Mex.) 27 Pac. Rep. 312.

<sup>3</sup>Huston v. Bybee, 17 Oreg. 140, 20 Pac. Rep. 51. See, also, Faull v. Cooke, 19 Oreg. 455, 26 Pac. Rep. 662; Heilbron v. Kings River

& F. C. Co., 76 Cal. 11, 17 Pac. Rep. 933; Last Chance Water-Ditch Co. v. Heilbron, 86 Cal. 1, 26 Pac. Rep. 523; Spargur v. Heard, 90 Cal. 221, 27 Pac. Rep. 198; Chauvet v. Hill, 93 Cal. 407, 28 Pac. Rep. 1066; Ball v. Kehl, 95 Cal. 606, 30 Pac. Rep. 780.

rights of riparian proprietors, as such, are recognized and protected, no appropriation can confer upon the appropriator any rights which would be in derogation of riparian rights on the same stream already vested. In such a case, therefore, the technical appropriation of the water is of no avail. At the same time, while it would be an unlawful act, in the sense of being actionable, still, if allowed to pass by the riparian owner, it may incidentally serve a useful purpose, viz. that of giving notice. But if the appropriator ultimately acquires rights adverse to those of the riparian proprietor, it will not be in consequence of the appropriation, but in consequence of his adverse user during the statutory period. Upon this point the supreme court of California has spoken as follows: "The term 'appropriation,' as applied to the acquirement of the right to the use of water, has in this state a statutory technical meaning; and the simple act of appropriation under the statute will not of itself defeat or extinguish any prior right. Actual and uninterrupted user, however, with or without the statutory appropriation, if adverse, for a useful purpose, and under claim of right, continued for the period prescribed by the statute of limitations, gives a prescriptive right which will extinguish the rights of the riparian proprietor. Statutory appropriation, therefore, is not necessary to prescription, but it gives to one who seeks to acquire a right by prescription this advantage, that it gives to prior claimants notice that his user is adverse and under claim of right, and sets the statute in motion against such prior claimant."<sup>1</sup>

The adverse user, however, must be continued without interference on the part of the riparian owner. For example, repeated and long-continued incursions on the riparian owner's land by the appropriator, for the purpose of diverting the water into the latter's ditch, will give him no

<sup>1</sup> *Alta L. & W. Co. v. Hancock*, 85 Cal. 219, 24 Pac. Rep. 645.  
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prescriptive rights, where the riparian owner restored the water to its natural channel as often as he discovered the diversion.<sup>1</sup> Also it is necessary that the adverse use should be continuous. But it is held that the adverse user of an irrigating ditch, through the lands of another, only during the cropping season, the ditch not being needed at other times, constitutes a continuous adverse user, as the omission to use when not needed does not break the continuity of the user.<sup>2</sup> A "squatter" who enters upon, occupies, and cultivates part of the riparian land of another, claiming adversely in the belief that it is government land, can gain no title to the use of the waters of the stream by diverting and using them for purposes of irrigating such land, since such use inures to the benefit of the true owner, and is not adverse to him; and it can make no difference that

<sup>1</sup> *Last Chance Water-Ditch Co. v. Heilbron*, 86 Cal. 1, 26 Pac. Rep. 523.

<sup>2</sup> *Hesperia L. & W. Co. v. Rogers*, 83 Cal. 10, 23 Pac. Rep. 196. In this case, the court observed: "The correct rule as to continuity of user to give a presumptive right to an easement, and what shall constitute such continuity, can be stated only with reference to the nature and character of the right claimed. The right is not abandoned to the use of a ditch to convey water for purposes of irrigation because water does not flow in it every day in the year. The party claimant does not need the ditch every day in the year, and the law does not require him to constitute continuity of use to use the water when he does not need it. If he has used the ditch at such times as he needed it, it is regarded by the law as a continu-

ous use. If a right of way over another's land has been used for more than five years, it is not necessary to make good such use that the claimant has used it every day. He uses it every day, or once in every week, or twice a month, as his needs require. He is not required to go over it when he does not need it, to make his use of the way continuous. The claimant is required to make such reasonable use of the way as his needs require. So it is of the ditch. If, whenever the claimant needs it, from time to time, he makes use of it, this is a continuous use. An omission to use when not needed does not disprove a continuity of use, shown by using it when needed. *Bodfish v. Bodfish*, 105 Mass. 319. Neither such intermission nor omission breaks the continuity."

the land irrigated does not border on the stream, since such land is not segregated in title by the occupancy, but remains part of the entire riparian tract.<sup>1</sup> And no prescriptive right, as against the uses to which an upper riparian proprietor may employ the water of the stream, can be acquired by the lower proprietor by merely diverting and using the water below.<sup>2</sup>

The riparian owner may also be precluded, in certain cases, on the ground of estoppel, from insisting upon his riparian rights. Thus, in a case in Oregon, it appeared that the defendant had diverted the water of a stream under a claim of title, and he believed, and had reason to believe, that the claim was well founded, and the plaintiff, the riparian owner, stood by without asserting or making known his claim, while the defendant was expending large sums of money and making extensive improvements under an honest and reasonable belief that he had the right to make such diversion, and without which right his expenditures would prove a total loss. And it was held that the plaintiff should not be permitted to set up his riparian interest.<sup>3</sup> But the fact that riparian owners made no objection to the use of water by an appropriator during seasons of abundance, when it naturally flowed down the river, gives the appropriator no prescriptive right to change the course of the flow in seasons of scarcity for the purpose of continuing the supply.<sup>4</sup> And it has been held that the rights of riparian owners are not lost by mere non-user of them.<sup>5</sup>

<sup>1</sup> *Alta L. & W. Co. v. Hancock*, 85 Cal. 219, 24 Pac. Rep. 645.

<sup>2</sup> *Mud Creek Irr. Co. v. Vivian*, 74 Tex. 170, 11 S. W. Rep. 1078.

<sup>3</sup> *Curtis v. La Grande Water Co.*, 20 Ore. 34, 25 Pac. Rep. 378. See, also, *Dalton v. Rentaria*, (Ariz.) 15 Pac. Rep. 37.

<sup>4</sup> *Last Chance Water-Ditch Co. v. Heilbron*, 86 Cal. 1, 26 Pac. Rep. 523.

<sup>5</sup> *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396, 24 N. E. Rep. 774, citing *Johnson v. Jordan*, 2 Metc. (Mass.) 234.

## II. USES TO WHICH THE WATER MAY BE PUT.

**§ 134. General statement of riparian rights—Van Sickle v. Haines.**

It thus appearing that the title of the Code concerning water rights has no application to nor operation upon the riparian rights of private riparian proprietors who hold the title to tracts of land on the banks of natural running streams in this state; that those rights are left existing as they have been declared by judicial decisions made before and since the adoption of the Code; and that those rights have thus been declared by judicial decisions to be substantially the same as the rights created, recognized, regulated, and protected by the common-law doctrines relating to the subject,—we are now in a position to inquire, with more of detail, what are the nature, extent, and limits of the rights held by private riparian proprietors in California; what uses of the water of streams do they confer, permit, or forbid; with special attention to the inquiry whether they permit the use of water for purposes of irrigation, and, if so, to what extent and under what limitations. As a preliminary to this proposed examination, I shall quote at some length from a decision made by the supreme court of Nevada, which covers all of the questions. The same physical conditions affecting the use of water exist in both states, and in both the common-law doctrines concerning the rights of private riparian proprietors are recognized as substantially controlling. These facts alone would recommend the decision to the attention of the courts and profession of California; but the decision itself is so important, and the opinion of Chief Justice Lewis is so able, learned, and exhaustive, that no excuse is needed for the long extracts which I have made. If the common-law doctrines still determine and regulate the rights of private riparian proprietors in our own

state, it is proper to know what these doctrines are, how they have been settled, and upon what authority they rest. The facts of the case present in a marked manner the distinction between the appropriation of water from streams while flowing wholly over the public lands of the United States, and the rights to the water held by a proprietor who has acquired a title as private owner to a tract of land bordering upon a stream. The opinion shows in the clearest manner the general nature, extent, and limits of the rights possessed by such private riparian proprietor, as established by the overwhelming *consensus* of authorities, English and American. Unless I am entirely wrong in the construction placed upon the title in the Civil Code, and unless the decisions of the California supreme court, heretofore quoted, are to be wholly disregarded, then, as it seems to me, the opinion of Chief Justice Lewis, in its reasoning and its conclusions, applies to and defines the rights of private riparian proprietors in California, with one modification, to be subsequently mentioned, growing out of a more recent statute of congress. The case to which I refer, and from which I now proceed to quote, is *Van Sickle v. Haines*.<sup>1</sup>

The facts were briefly as follows: In 1857 the plaintiff, Van Sickle, diverted a portion of the waters of Daggett creek, a natural innavigable stream, by means of a ditch for irrigating and domestic purposes, to be used upon a tract of land in his possession not situated upon the banks of said creek. The diversion was made at a point then on the public land, but the tract of land bordering on the creek and including this point was, in 1864, conveyed by patent from the United States to the defendant Haines. In 1865 Van Sickle obtained a patent from the

<sup>1</sup> 7 Nev. 240. [But note that this decision, in so far as it holds that the common-law doctrine of riparian rights is applicable and in

force in Nevada, was impliedly overruled in *Reno Smelting Works v. Stevenson*, 20 Nev. 269, 21 Pac. Rep. 317.]

United States for the tract in his possession, on which he used the water. In 1867 Haines constructed a flume on his own land, and by its means diverted the water of the creek for the benefit of his own riparian tract of land, and thereby deprived Van Sickle of the supply of water which he had been using. In 1870 Van Sickle brought an action, which resulted in a judgment for damages against Haines, and a perpetual injunction restraining him from interfering with the plaintiff's prior appropriation. It should be carefully noticed that the plaintiff, Van Sickle, was not a riparian proprietor. On appeal, the judgment was reversed by the supreme court, and a decree was ordered for the defendant dismissing the suit. The court held, among other points, that, since there can be no title acquired by adverse user against the United States, the time during which a person diverts water from a stream wholly on the public land, previous to the issue of a patent to a private riparian proprietor, cannot be set up as an adverse user against such patentee. The same has been held by California decisions.<sup>1</sup> The plaintiff presented a petition for a rehearing, and thereupon a second most able and exhaustive opinion by Lewis, C. J., was delivered, from which I shall quote several passages that seem to bear upon the general questions under discussion. This opinion opens with some preliminary observations which are peculiarly appropriate and instructive, (pages 257, 258:) "We are unable to understand from the petition what exact condition is assigned to running water in the catalogue of rights or property; or what the nature of the title which may be acquired to it, if any. Much thereof is devoted to showing that there can be no property in running water; that it is, and must of necessity remain, common to all; that it is a thing 'the property of which belongs to no person, but the use to all;' and in

<sup>1</sup>Pope v. Kinman, 54 Cal. 3.

the same sentence it is said that it 'is *publici juris*, *res communis*, and *bonum vacans*.' This *abandon* in the use of legal expressions is evidently the result of a radical misunderstanding of the signification which is given to them in the books of law. True, it is often said that water is *publici juris*, or belongs to those things which are *res communes*; but how it can be either *publici juris* or *res communis* and also *bonum vacans* is a problem not yet solved in the science of the law. If common property, or, as argued by counsel, something in which no one has an absolute property, but every one has the use, the right to the use must then certainly be in the community; but *bonum vacans* is a thing without an owner of any kind, and which belongs absolutely to the person who may first find or appropriate it, and he has the complete right of property in it as against the world. It is a flat contradiction, in terms, to say that running water is at the same time common property and *bonum vacans*. But we have the word of Lord Denman in *Mason v. Hill*,<sup>1</sup> and of Baron Parke in *Embrey v. Owen's Ex'rs*,<sup>2</sup> that it was never considered *bonum vacans*. Nor are these contradictions confined simply to legal terms. The argument proceeds upon the assumption that running water belongs to the community generally, and authorities are cited which are supposed to sustain that doctrine, as the quotation from Blackstone, who says, 'water flowing is *publici juris*. By the Roman law, water, light, and air were *res communes*, and which were defined things, the property of which belongs to no person, but the use to all.' Yet, after arguing to show that water is common property, it is also claimed that a stream may be absolutely appropriated by the first person who may wish to use it. In other words, that water, instead of being something which belongs to all in common, as is argued at first, is a thing which belongs absolutely

<sup>1</sup> 5 Barn. & Adol. 22.<sup>2</sup> 6 Exch. 353.

to him who first appropriated it, to the extent even that, if it be necessary for the purpose for which the appropriation is made, it may be completely consumed. Surely, the two propositions are as irreconcilably contradictory as any that can be named. As an illustration, it is argued that running water is like the air, to which certainly all have an equal right, and with which no one has the right to interfere to the injury of another. But in this case the right is claimed by Van Sickle to deprive the appellant of the stream, which in the ordinary course of things he would be enabled to enjoy, and to appropriate it exclusively to himself. If running water be like the air, then surely no one has the right to interfere with it in its natural state to the prejudice of others. When positions so utterly contradictory are assumed, the real questions in the case are likely to be involved and obscured, rather than elucidated." The following observations concerning the influence which the "public interests" should have upon the decisions of cases involving private rights, are of weighty importance in this community as well as in Nevada and every other state. While courts most certainly have a legislative function, since the great body of common law and of equity has been built up by courts, it should never be forgotten that courts do not rightfully possess the power of legislating *from motives of mere policy or expediency*. The duty of courts is to declare and protect private rights of suitors by applying or extending some established principle or doctrine to new conditions of facts. The court say, (page 259:) "Before proceeding to an investigation of the legal questions really involved in the case, we may state, once for all, that the fact that the case is of great interest to the public, whose rights, it is claimed, 'are seriously disturbed by the decision,' is a consideration which, in very doubtful cases, may, and perhaps should, have some weight with judicial tribunals. But that the interests of the public should receive a more favorable con-

sideration than those of any individual, or that the legal rights of the humblest person in the state should be sacrificed to the weal of the many, is a doctrine which, it is to be hoped, will never receive sanction from the tribunals of this country. The public is in nothing more interested than in scrupulously protecting each individual citizen in every right guarantied to him by the law, and in sacrificing none, not even the most trivial, to further its own interests. Every individual has the right, equally with the public at large, to claim a fair, impartial consideration of his case; for the rights of the public are no more sacred, or entitled to greater protection in law, than those of the individual; and therefore, in actions between individuals, the consideration of public interest has weight only when there is grave doubt as to where the right lies. This doctrine which would justify the courts in depriving a person of a civil right to-day for the public good, might to-morrow force them to sacrifice his life to the clamor of a mob; which would deprive Haines of his property at one time, might operate against Van Sickle at another. As in this case we have no doubt whatever as to what should be our conclusion, the fact that it may injuriously affect the public can have no weight in its consideration. Happily, however, we do not think the decision, if properly understood, will produce the general disastrous results apprehended by counsel." Coming to the merits of the case, the learned chief justice states the material questions to be considered and determined, (page 260:) "As the appellant claims the water of Daggett creek as an incident to the land patented to him by the United States, and as it is admitted that he could get only such title and right as was vested in the United States itself, it becomes necessary to ascertain what is the nature of the rights of the federal government to the public land, and we purpose to show (1) that the United States has the absolute and perfect title; (2) that running water is primarily an inci-

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dent to or part of the soil over which it naturally flows; (3) that the right of the riparian proprietor does not depend upon the appropriation of the water by him to any special purpose, but that it is a right incident to his ownership in the land to have the water flow in its natural course and condition, subject only to those changes which may be occasioned by such use by the proprietors above him as the law permits them to make of it; (4) that the government patent conveyed to Haines not only the land, but the stream naturally flowing through it; (5) that the common law is the law of this state, and must prevail in all cases where the right to water is based upon the absolute ownership of the soil." The chief justice follows this statement by an elaborate argument and citation of authorities showing that the United States has the absolute title in fee-simple in all the public lands, to the same extent and in like manner as any private owner has; and that this title includes all the incidents and power of absolute private ownership, (pages 261-264.) As the correctness of these conclusions is undoubted, it is unnecessary to quote this portion of the opinion. He then proceeds to consider the right to water as an incident of ownership, (page 264:) "Being absolute owner of the soil, the source of all title thereto, and entitled to all the remedies for its protection and preservation which are given to any individual owner, it certainly cannot be maintained that the United States is not equally entitled to everything which is naturally such an inseparable incident to the land that it is frequently spoken of as a part of the soil itself. Such an incident is a natural water-course. It passes by deed of the soil without any mention, and forms as marked a feature of the land through which it passes as the trees upon it or the vegetation which it nourishes. Nothing more readily recommends itself to the understanding than that an element which the laws of nature have connected with the freehold, and which, without any effort on the part of man, clothes

it with refreshing verdure,—when without it there must be only forbidding nakedness; creating fertility and productiveness where otherwise there would be only sterility; at once administering pleasure and affording profit,—is necessarily a part of or incident to his land. This is the natural effect of running water, independent of any use which may be made of it in administering to the immediate wants of man and beast. How frequent is it that small streams of water are found to add immeasurably to the value of estates, even where no particular use is made or intended to be made of them. It is very seldom, indeed, that they do not to some extent enhance the value of real property, and they are frequently esteemed invaluable. \* \* \* How can it be said, then, that a water-course is not essentially a part of the freehold itself. That it is so, the authorities bear abundant witness. We do not wish to be understood as saying that there is such an absolute property in the water that the whole stream may be destroyed by a riparian proprietor, so that others below him will be deprived of it; but that it is an incident of his land to the extent that he has the right to have it continue to flow in its natural course, subject to such changes only as may be occasioned by such use of it as the law allows the various proprietors to make, as it passes along, and which will be hereafter more fully explained. In this sense only is the right to be understood, when spoken of in the authorities about to be quoted.” The opinion then quotes numerous authorities, and it may not be inappropriate to copy those which are cited from American decisions.

After quoting the general definitions given by Lord Coke and by Mr. Angell, the chief justice proceeds, (page 266:) “The supreme court of Ohio says:<sup>1</sup> ‘The uses of the waters of private streams belong to the owners of the land over which they flow.

<sup>1</sup>Buckingham v. Smith, 10 Ohio, 297.

They are as much individual property as the stones scattered over the soil.' Chancellor Kent says:<sup>1</sup> 'A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold of which no man can be disseized but by the lawful judgment of his peers, or by due process of law.' It is said in the note to *Ex parte Jennings*:<sup>2</sup> 'The general distinction deemed of so much excellence and importance by these learned judges, and which at this day no lawyer will hazard his reputation by controverting, is that rivers not navigable—that is, fresh-water rivers of what kind soever, do of common right belong to the owners of the soil adjacent, to the extent of their land in length; but that rivers where the tide ebbs and flows belong of common right to the state.' In *Wadsworth v. Tillotson*,<sup>3</sup> speaking of the rights to a water-course, the supreme court says: 'This right is not an easement or appurtenance, but is inseparably annexed to the soil, and is parcel of the land itself.' Chief Justice Shaw says:<sup>4</sup> 'The right to flowing water is now well settled to be a right incident to property in the land.' In another case the same judge says:<sup>5</sup> 'It is inseparably annexed to the soil, and passes with it, not as an easement or as an appurtenance, but as parcel. Use does not create it, and disuse cannot destroy nor suspend it.' The supreme court of North Carolina says:<sup>6</sup> 'The right is not founded in user, but is inherent in the ownership of the soil, and, when a title by use is set up as against another proprietor, there must be an enjoyment for such a length of time as will be evidence of a grant.' \* \* \* 'The common right here spoken of is not that existing in all men in respect to things *publici juris*, but that common to the proprietors of the land on the stream. And, as between them,

<sup>1</sup> *Gardner v. Village of Newburgh*, 2 Johns. Ch. 166.

<sup>2</sup> 6 Cow. 543.

<sup>3</sup> 15 Conn. 372.

<sup>4</sup> *Elliot v. Fitchburg R. R.*, 10 Cush. 193.

<sup>5</sup> *Johnson v. Jordan*, 2 Metc. 239.

<sup>6</sup> *Pugh v. Wheeler*, 2 Dev. & B. 55.

the use to which one is entitled is not that which he happens to get before another, but it is that which, by reason of his ownership of the land on the stream, he can enjoy on his land and as appurtenant to it.' The supreme court of Vermont say:<sup>1</sup> 'The owner of land has rights to the use of a private stream running over his land peculiar to himself as owner of the land, not derived from occupancy or appropriation, and not common to the whole community. It is the right to the natural flow of the stream. Of this right he cannot be deprived by the mere use or appropriation by another, but only by grant, or by the use or occupancy of another, for such length of time as that therefrom a grant may be presumed.'" The right to the water of running streams being thus an incident of ownership by a riparian proprietor is held by the United States as completely as by any private owner, and necessarily passes to its grantee by the patent which conveys the full legal title to the tract of land bordering on the stream. In examining still more closely the nature of the right, and showing that it does not depend upon actual use or appropriation of the water by a riparian owner, the learned chief justice most ably proceeds as follows, (pages 268-272:) "If a stream be an incident to the land, it can no more be diverted, simply because it cannot be presently used by the person owning the land, than he can be deprived of any other property for the same reason. The whole argument on this point evidently originates out of an utter misunderstanding of what is meant by the language, when it is said that the riparian proprietor 'has no property in the water itself, but simply a usufruct while it passes along.' The reason for this expression is this: that as each proprietor has a right to the flow of the stream through his land as it was wont to flow, as it is the common property of all the owners of the soil through which it

<sup>1</sup> Davis v. Fuller, 12 Vt. 178.

passes, no one of them can have such a property in the water as will entitle him to consume or divert it all from those on the stream below him, as he might do if he had an absolute property in the water itself; hence the expression so often used. It is, however, never employed as limiting the entire right of the riparian proprietor to the *mere use* of the water. He has another right, and one which is universally admitted; that is, the right to have the stream continue to flow through his land, irrespective of whether he *may* need it for any special purpose or not. He has the right to the natural benefit which a stream affords, independent of any particular use, for the fertility which its natural flow imparts to the soil. In other words, his right has a double aspect: *First*, the right of having the course of the stream continued through his land, which is absolute and complete, as against all the world; and, *secondly*, the right to make such use of the water, as it passes through his land, as will not damage those who are located on the same stream, and are entitled to equal rights with himself. If this be not the character of his right, what is to be understood by the maxim too often quoted, and which lies at the foundation of water rights, *aqua currit et debet currere ut currere solebat*? This is substantially that no man has the right to divert a stream from its natural course; for to say that water should be permitted to run as it used to, is a prohibition upon all to divert it from its course; and thus the very maxim shows the proprietors have the right to claim that the stream shall be permitted to run through their land in its natural channel, independent of whether they make any particular use of it or not. Suppose there be a water-fall or water-power upon a tract of land, and it may be supposed that the tract is valuable only for a mill-site, but is not presently used, will it be said that its whole value may be destroyed by the diversion of the water, or that a valuable mineral spring, which is not yet used, may be abstracted from it, and that the

owner had no remedy, simply because he had not appropriated it to some useful purpose when the diversion or abstraction took place? Indeed, the authorities are, without exception, that the right to have the water flow in its accustomed channel does not depend upon the fact that any special use is or may be made of it by the proprietors; and no case, no *dictum*, and no intimation of opinion to the contrary, when rightly understood, can be found in the books. It is said by Mr. Phear<sup>1</sup> 'that every riparian proprietor has a right, whether he uses the stream or not, to have its natural conditions within his own limits preserved from sensible disturbances arising from acts on the part of the riparian proprietors, whether above or below, or on the opposite banks.' The court of king's bench say:<sup>2</sup> 'The proposition that the first occupant of running water for a beneficial purpose has a good title to it, is perfectly true in *this* sense, viz., that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. In this, as in any other case of injury to real property, possession is a good title against a wrong-doer, and the owner of the land who applies the stream that runs through it to the use of a mill newly erected, or to other purposes, if the stream is diverted or obstructed, may recover for the consequential injury to the mill. *But it is a very different question whether he can take away from the owner of the land below one of its natural advantages, which is capable of being applied to profitable purposes, and generally increases the fertility of the soil even where unapplied, and deprive him of it altogether by anticipating him in its application to a useful propose. If this be so, a considerable part of the value of an estate might at any time be taken away; and by parity of reasoning a valuable mineral spring might be abstracted from the proprietor in whose land it rises, and converted*

<sup>1</sup> Phear, *Water-Courses*, 31.

<sup>2</sup> *Mason v. Hill*, 5 Barn. & Adol. 11.

to the profit of another.' Mr. Justice Creswell says:<sup>1</sup> 'It appears to us that all persons owning lands on the margin of a flowing stream have, by nature, certain rights to use the water of that stream, whether they exercise those rights or not.' And Lord Ellenborough says:<sup>2</sup> 'The general rule of law as applied to this subject is that, independent of any particular enjoyment used or to be had by another, every man has a right to have the advantage of a flow of water in his own land.' The supreme court of Massachusetts says:<sup>3</sup> 'If the use which one makes of his right in the stream is not a reasonable use, or if it causes a substantial and actual damage to the proprietor below by diminishing the value of his land, though at the same time he has no mill or other work to sustain present damage, still, if the party then using it has not acquired a right by grant, or by actual appropriation and enjoyment for twenty years, it is an encroachment on the right of the lower proprietor for which an action will lie.' The learned Chief Justice Ruffin of North Carolina says upon this point:<sup>4</sup> 'The argument of the counsel, however, assumes that the right to water can be acquired only by use, and therein we think consists its error. The *dicta* on which he relies had reference to the cases of prescriptive title, or where the party had only the rights of a possessor. But it is not true that the right to water is acquired only by its use, and that it cannot exist independent of any particular use of it. That doctrine is correctly applied to the air and to the sea, or such bodies of water as from their immensity cannot be appropriated by individuals, or ought to be kept as common highways for the constant use of the country and the enjoyment of all men. In such case particular persons cannot acquire a right,—that is, a

<sup>1</sup>Sampson v. Hoddinott, 1 C. B. (N. S.) 611.

<sup>2</sup>Bealey v. Shaw, 6 East. 208.

<sup>3</sup>Elliot v. Fitchburg R. R., 10 Cush. 191.

<sup>4</sup>Pugh v. Wheeler, 2 Dev. & B. 50.

several and exclusive right, by use or any other means; but with smaller streams it is otherwise. They may still be *publici juris*, so far as to allow all persons to drink the water and the like, and also so far as to prevent a person to whose land it comes from thus consuming it entirely by applying it to other purposes than those for which it is conceded to every one, *ad lavandum et potandum*, as to divert or corrupt it.' And the supreme court of New York says:<sup>1</sup> 'A person through whose farm a stream naturally flows is entitled to have it pass through his land, although he may not require the whole or any part of it for the use of machinery. Upon any other principle this right to the stream, which is as perfect and indefeasible as the right to the soil, would always depend upon the use, and a party who did not occupy the whole for special purposes would be exposed to have the same diverted by his neighbor above him without remedy, and which diversion by twenty years' enjoyment would ripen into a prescriptive right beyond his control, and thereby defeat any subsequent use.' Such is the invariable rule, iterated and reiterated through all the books, and of which there seems to be no denial. These cases show that the owner of soil can insist upon having the stream continue to run through his land as it was wont, independent of any special use of it. The fact, as stated by Chief Justice Ruffin, that he is necessarily and at all times using the water running through his land, in so far at least as the water imparts fertility to the soil and enhances its value, is a sufficient user to entitle him to claim that he shall not be deprived of it."

The learned judge then proceeds to discuss at length the effect of certain territorial legislation, but this portion of his opinion I omit, since it has no bearing upon any general questions. The conclusion of his opinion touches upon a subject of great inter-

<sup>1</sup> Crooker v. Bragg, 10 Wend.260. See, also, Corning v. Troy Iron & Nail Factory, 40 N. Y. 191.



est in the state of California, and I shall therefore quote it at length, (pages 284-287:) "It is said that the rule which is adopted in this case may be the rule of the common law, but that it is not applicable to our situation, and therefore should not be followed. We have shown that a stream is an incident of the land through which it naturally flows; that it is, in fact, a part of the soil itself; that the right to have it continue to flow is as sacred a right as that to the soil itself; that, being so an incident of the land, it necessarily passes by conveyance of the land. Such being the law, we are unable to understand how or by what authority this court can say the patent of the United States does not convey as complete and perfect a title to its patentee in the state of Nevada as it does elsewhere. There is no rule within our knowledge which would justify a court, independent of any common-law principle, in holding that the appellant Haines should not have the benefits of a stream of water which the paramount proprietor of the soil grants to him by its letters patent. It might as well be said that the courts can deprive him of the land itself by holding that it did not pass by the patent, as to rule so respecting that which is universally admitted and held to be an inseparable and valuable incident to it. But *perhaps* it is an unwarranted conclusion drawn from our opinion in this case, namely, that the water of a stream could not be used by the riparian proprietor for *irrigation*, which is thought to be inapplicable to the condition of things in this state. To this it may be answered—*First*, that no such decision has been made, nor has anything of the kind been intimated; *second*, whatever the common-law rule may be, whether applicable or not, it is made the law of this state, and is as binding on us as is any statute ever adopted by the legislature; and therefore we have no more power to annul or repudiate it than we have to disregard a legislative act. The first legislature of the territory of Nevada (see St. 1861, p. 1) declared that 'the common law of England, so

far as it is not repugnant to or inconsistent with the constitution or laws of the United States, or the laws of the territory of Nevada, shall be the rule of decision in all courts of this territory.' Our state constitution adopted this by section 2 of the schedule. Hence, although the common law might, in the opinion of judges, be inapplicable, still, if not in conflict with the constitution or laws of the United States, or the constitution or laws of Nevada, it must nevertheless be enforced. But suppose that decision should necessitate the adoption of the common law respecting the manner in which running water may be used by those having the right to it; although it may operate unjustly in some cases, still, *as a general rule, none more just and reasonable can be adopted for this state.* It is a rule which gives the greatest right to the greatest number, authorizing each to make a reasonable use of it, providing he does no injury to the others equally entitled to it with himself; while the rule of prior appropriation would authorize the first person who might choose to make use of or divert a stream, to use or even waste the whole, to the utter ruin of others who might wish it. The common law does not, as seems to be claimed, deprive all of the right to use, but, on the contrary, allows all riparian proprietors to use it in any manner not incompatible with the rights of others. When it is said that a proprietor has the right to have a stream continue through his land, it is not intended to be said that he has the right to *all* the water, for that would render the stream which belongs to all the proprietors of no use to any. What is meant is that no one can absolutely divert the whole stream, but must use it in such a manner as not to injure those below him. As the right is equal in each owner of the land, because naturally each owner can equally enjoy it, so one must exercise that right in himself without disturbing any other above or below in his natural advantages. Chief Justice Shaw says:<sup>1</sup> 'The

<sup>1</sup>Elliot v. Fitchburg R. R., 10 Cush. 193.

right of flowing water is now well settled to be a right incident to property in the land; it is a right *publici juris*, of such a character that while it is common and equal to *all through whose land it runs*, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down, whose said just and reasonable use may often be a difficult question, depending on various circumstances. \* \* \* It has sometimes been made a question whether a riparian proprietor can divert water from a running stream for purposes of irrigation. But that we think an abstract question, which cannot be answered either in the affirmative or negative as a rule applicable to all cases. That a portion of the water of a stream may be used for the purpose of irrigating land, we think is well established as one of the rights of the proprietor of the soil along or through which it passes. Yet a proprietor cannot, under color of that right, or for the actual purpose of irrigating his own land, wholly obstruct or divert the water-course, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it if not diverted or used unreasonably.' This is the doctrine uniformly recognized both in England and in the United States, and is the necessary result of the general principles universally recognized respecting running water. Whether the right to irrigate land can in this state be considered a 'natural want,' is a point in nowise involved in this case, and which, therefore, does not call for decision." In conclusion, the learned judge shows that the early decisions in Nevada and a series of cases in California have no bearing whatever upon the questions con-

cerning riparian rights, since they related exclusively to the appropriation of water of streams wholly public, by parties who were not riparian proprietors. It has already been shown that the California courts make the same distinction. As throwing light upon the discussion, and as supporting his positions, the chief justice cites a long list of cases, which for purposes of reference I have thought proper to place in the foot-note.<sup>1</sup>

### § 135. Modifications on doctrine of *Van Sickie v. Haines*.

The decision in *Van Sickie v. Haines* is subject to some modification, in respect to one of its conclusions, by the legislation of congress. The court expressly held that a patent granted by the United States to a private person, conveying the full legal title to a tract of what had been public land situated on the bank of a stream, although all the rest of the land on its banks was still public, *ipso facto*, and necessarily, so far as the patentee's riparian rights to the stream were concerned, cut off and annulled all rights to use the waters of the same stream as a

<sup>1</sup> *Mason v. Hill*, 3 Barn. & Adol. 305; 5 Barn. & Adol. 1; *Sampson v. Hoddinott*, 1 C. B. (N. S.) 611; *Embrey v. Owen*, 6 Exch. 353; *Wright v. Howard*, 1 Sim. & S. 190; *Davis v. Getchell*, 50 Me. 602; *Heath v. Williams*, 25 Me. 209; *Lick v. Madden*, 25 Cal. 209; *Blanchard v. Baker*, 8 Greenl. 253; *Davis v. Fuller*, 12 Vt. 178; *Snow v. Parsons*, 28 Vt. 459; *Tillotson v. Smith*, 32 N. H. 90; *Gerrish v. New Market Manuf'g Co.*, 30 N. H. 478; *Ingraham v. Hutchinson*, 2 Conn. 584; *Parker v. Hotchkiss*, 25 Conn. 321; *Wadsworth v. Tillotson*, 15 Conn. 366; *King v. Tiffany*, 9 Conn. 162; *Elliot v. Fitchburg R. R.*, 10 Cush. 191; *Tyler v. Wilkinson*, 4 Mason,

397; *Webb v. Portland Manuf'g Co.*, 3 Sum. 189; *Gardner v. Village of Newburgh*, 2 Johns. Ch. 163; *Ex parte Jennings*, 6 Cow. 518; *Canal Appraisers v. People*, 17 Wend. 570; 5 Wend. 423; *Rogers v. Jones*, 1 Wend. 237; *People v. Canal Appraisers*, 13 Wend. 355; *Crooker v. Bragg*, 10 Wend. 260; *Arnold v. Foot*, 12 Wend. 330; *Commissioners v. Kempshall*, 26 Wend. 404; *Corning v. Troy Iron-Works*, 34 Barb. 486; 40 N. Y. 204; *Campbell v. Smith*, 3 Halst. 140; *Plumleigh v. Dawson*, 1 Gilman, 544; *Pugh v. Wheeler*, 2 Dev. & B. 50; *Board of Trustees v. Haven*, 11 Ill. 554; *Moffett v. Brewer*, 1 Greene, (Iowa,) 348.

*public* stream acquired by prior appropriation, and held by parties who were not private riparian proprietors. The reasons for the conclusion were that the appropriation of the waters of streams running over the public lands was wholly permissive; the right of the appropriator could never become complete against the United States by adverse use, but it was a new license or privilege, subject to be revoked and abrogated at any time by the United States; and that a patent, by which the full legal title of the United States, with all of its incidents, was conveyed to the patentee, necessarily clothed such patentee with all rights over the land which had belonged to the United States, and conveyed to him the land entirely free from all claims to the water of the stream growing out of the prior appropriation and uses. On principle, and in the absence of contrary legislation, the correctness of this ruling cannot be doubted. It has, however, been modified within certain limits by a statute of congress referred to twice in a previous chapter. This statute provides, in substance, that the waters of public streams may be appropriated, under local customs and laws, for various purposes connected with mining; and that, when such appropriations have been made from the waters of a public stream, patents subsequently issued by the United States to private persons shall be subject to the rights of the appropriator, and conditions reserving or protecting such existing rights shall be incorporated into the patent.<sup>1</sup> The result is that when the waters of a stream flowing wholly over the public land have been appropriated for a purpose recognized and protected by the statutes of congress, and a patent is subsequently issued by the United States to a private person conveying the title to a tract of land on the banks of the same stream, the patentee takes his title, and must enjoy his rights as a riparian proprietor subject and subordinate to the

<sup>1</sup> Rev. St. U. S. § 2338.

already existing rights of the prior and actual appropriator. On the other hand, whenever the waters of a stream, flowing wholly over the public land, have not been appropriated at all for any purpose, or whenever they have been appropriated for a purpose not recognized and protected by the congressional legislation, and a patent is issued by the United States to a private person conveying a tract of land on the banks of the same stream, in either case the patentee obtains, as incidents of his title, the full and complete rights of a private riparian proprietor on the stream. His title to the extent of his right as riparian proprietor is paramount to any subsequent appropriation from the stream as a public stream; and his rights in the stream are as perfect and complete when he is the sole private proprietor on its banks as when all the lands on its banks are held by private owners.

### § 136. Legitimate riparian uses.

Assuming, as has been shown, that the "riparian rights" of private "riparian proprietors" on natural running streams in this state of California are expressly excepted from the operation of the title concerning water-rights in the Civil Code, are wholly untouched by its provisions, and are left existing in every respect as though it had not been enacted, we are now in a position to ascertain, with more certainty and definiteness, the nature and extent of these rights, and what uses of the waters they confer upon or withhold from the "riparian proprietor."

### § 137. California decisions.

The series of decisions heretofore cited show most conclusively that all of the fundamental common-law doctrines concerning the riparian rights of private riparian proprietors, which were so fully and ably expounded in the Nevada case, have been

adopted by the California court, and recognized as forming a part of the California law. While the reasons for these doctrines have not been explained at such length in the California cases, and while the authorities upon which they rest have not been so exhaustively quoted, yet, upon a comparison of the various decisions, it will appear, beyond a possibility of a doubt, that all of the essential and important doctrines of the common law, as discussed and formulated by the Nevada court in the case of *Van Sickle v. Haines*, have been accepted and affirmed by the supreme court of California in repeated decisions. To present this conclusion in the clearest light, I give, even at the expense of repeating what has already been said, a brief summary of those decisions.

### § 138. Natural uses.

It is held that the right of the private riparian proprietor is an incident of his ownership of land on the bank of the stream, and exists as a necessary consequence of such ownership, and does not in the slightest depend upon the fact of an actual appropriation of the water having been made by himself or by any other riparian proprietor on the same stream.<sup>1</sup> The right to the water is not an absolute property in all the water, authorizing any riparian proprietor to consume it entirely; it is a right that the stream should continue to flow along in its natural channel as it has been accustomed to flow, and give the riparian proprietor the *usufruct* of the water as it passes along his land bordering on the stream; and this right belongs equally to all the private proprietors on the banks of the same stream, subject only to the advantage which position gives to those higher up the stream over proprietors lower down.<sup>2</sup> The law recognizes cer-

<sup>1</sup> *Pope v. Kinman*, 54 Cal. 3; *Creighton v. Evans*, 53 Cal. 55; *Ferrea v. Knipe*, 28 Cal. 341.

<sup>2</sup> *Id.*

tain *natural* uses which are paramount to all others, and these include the use of water for household and domestic purposes, washing, drinking, cooking, etc., and its uses for watering stock. It may be doubted whether these "natural uses" embrace anything more than these two purposes. From these paramount *natural* uses originates the *only* advantage which the common law gives to one riparian proprietor over another or others on account of his relatively superior position. A proprietor higher up on the stream may use as much of the water as is reasonably necessary for his own domestic and household purposes, and for the watering of his own stock, even though the amount left flowing down the stream is thereby so much diminished that there is not enough left to supply the needs of the lower proprietor or proprietors for the same purposes. But the use for these purposes by a proprietor higher up the stream must be reasonable in amount, and reasonable in its methods and instrumentalities.<sup>1</sup>

### § 139. Secondary uses.

In addition to these natural and paramount uses, which necessarily consume the portion of water used, each riparian proprietor, by virtue of his *usufruct*, may use the water of the stream, as it passes along by or through his land, for any other lawful purpose, provided he returns all of the water, undiminished in amount and undeteriorated in quality, into the natural channel of the stream before it leaves his own land and enters upon that of the adjacent proprietor below him, and provided, also, he does not thereby interfere with the similar and equal right of the proprietor upon the immediately opposite bank of the stream, where his own land abuts upon only one bank,—that is,

<sup>1</sup>Id. And see *Slack v. Marsh*, 11 127; *Shook v. Colohan*, 12 Or. 239, Phila. 543; *Stein v. Burden*, 29 Ala. s. c. 6 Pac. Rep. 503.



when the stream does not flow through his own land. In this manner any riparian owner may use the water of a stream for propelling machinery on his own land, provided he returns all the water into the natural channel before it leaves his own land, and does not impair its quality; and to this end he may construct a dam in the stream upon his own land, provided he does not interfere with the land of proprietors above him by the backwater, and does not invade the rights of a proprietor immediately opposite to himself on the other bank of the stream. These rights are conferred by the common law upon all of the proprietors owning lands upon the same stream. Any proprietor may, of course, obtain more extensive rights by grant from others, or by prescription. How far the right of the riparian proprietor includes the right to use and consume the water for purposes of irrigation, remains to be considered.

#### § 140. Reasonable riparian use.

[The rule that every riparian proprietor has an equal right to the use of the water as it is accustomed to flow, without diminution or alteration, is subject to a well-recognized limitation, viz., that each owner may make a reasonable use of the water for domestic, agricultural, and manufacturing purposes.<sup>1</sup> But here

<sup>1</sup> Embrey v. Owen, 6 Exch. 352; Nuttall v. Bracewell, L. R. 2 Exch. 1; Miner v. Gilmour, 12 Moore, P. C. 131, 156; Tyler v. Wilkinson, 4 Mason, 397; Union Mill Co. v. Ferris, 2 Sawy. 176; Gerrish v. New Market Manuf'g Co., 30 N. H. 478; Tillotson v. Smith, 32 N. H. 90; Norway Plains Co. v. Bradley, 52 N. H. 86; Holden v. Lake Co., 53 N. H. 552; Snow v. Parsons, 28 Vt. 459; Barrett v. Parsons, 10 Cush. 367; Elliot v. Fitchburg R. R., Id. 191; Cary v. Daniels, 8 Metc. 466; Pitts v. Lancaster Mills, 13

Metc. 156; Thurber v. Martin, 2 Gray, 394; Tourtellot v. Phelps, 4 Gray, 370; Chandler v. Howland, 7 Gray, 348; Wood v. Edes, 2 Allen, 578; Twiss v. Baldwin, 9 Conn. 291; Wadsworth v. Tillotson, 15 Conn. 366; Agawam Canal Co. v. Edwards, 36 Conn. 476; Merritt v. Brinkerhoff, 17 Johns. 306; Clinton v. Myers, 46 N. Y. 511; Acquackanonk Water Co. v. Watson, 29 N. J. Eq. 366; Farrell v. Richards, 30 N. J. Eq. 511; Williamson v. Canal Co., 78 N. C. 156; McElroy v. Goble, 6 Ohio St. 187; State v.

it is necessary to note an important distinction between primary and secondary, or natural and artificial, wants; for, to supply his *natural* wants, as for household purposes, for quenching thirst, and for his cattle, a riparian proprietor may consume the entire stream if necessary; but for *artificial* wants, as for irrigating his land or propelling his machinery, he is only entitled to a reasonable use.<sup>1</sup> In the case of *Hayden v. Long*,<sup>2</sup> the trial court instructed the jury that "every person through whose premises water naturally flows has a lawful right to the flowing of the water in its natural channel, and no person has a right to divert the stream or any part of it from its natural channel, unless he causes it to return again before it leaves his premises, so that it will not injure those below,

*Pottmeyer*, 33 Ind. 402; *Evans v. Merriweather*, 3 Scam. 492; *Plumleigh v. Dawson*, 1 Gilman, 544; *Batavia Manuf'g Co. v. Newton Wagon Co.*, 91 Ill. 230; *Dumont v. Kellogg*, 29 Mich. 420; *Hazeltine v. Case*, 46 Wis. 391, s. c. 1 N. W. Rep. 66; *Swift v. Goodrich*, 70 Cal. 103, 11 Pac. Rep. 561; 3 Kent, Comm. \*440; *Ang. Water-Courses*, § 95; *Washb. Easem.* \*216; *Gould, Waters*, § 205.

In 2 *Washb. Real Prop.* (4th Ed.) 348, it is said: "There are sundry uses which each successive owner along the stream may exercise, though by so doing he impairs to some extent the enjoyment by others of the full flow of the water, provided it be done in a reasonable manner, and not so as thereby to destroy or materially diminish the supply of the water, or render useless its application by the other riparian proprietors, either by the quantity consumed or by corrupting its quality, by throwing it back upon the lands of others above, or

diverting and stopping its flow so as to affect such lands below his own premises. Each case must depend upon its own circumstances; but among the uses to which a riparian proprietor may be said to have a natural right to apply the waters of a stream, to the extent already indicated, are such agricultural and domestic purposes as irrigating his land, watering his cattle, and the like;" citing *Mason v. Hill*, 5 Barn. & Adol. 1; *Wood v. Wand*, 3 Exch. 748, 775; *Embrey v. Owen*, 6 Exch. 353; *Webb v. Portland Co.*, 3 Sum. 189; *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590.

<sup>1</sup> *Evans v. Merriweather*, 3 Scam. 492; *Stein v. Burden*, 29 Ala. 127; *Slack v. Marsh*, 11 Phila. 543; *Baker v. Brown*, 55 Tex. 377; *Rhodes v. Whitehead*, 27 Tex. 314; *Fleming v. Davis*, 37 Tex. 173.

<sup>2</sup> 8 *Oreg.* 244. See, also, *Van Bibber v. Hilton*, 84 Cal. 585, 24 Pac. Rep. 308.

and be lessened or diminished only by such quantity as may be necessarily used for domestic purposes and watering stock, and in some cases for irrigation, and also by evaporation and natural and necessary wastage." It was held that this was a correct statement of the law applicable to the respective rights of riparian proprietors, though it was not applicable in the present case, as the diversion complained of was made by a person who was not a riparian owner.

The question, *what is a reasonable use?* depends upon a number of circumstances; upon the subject-matter of the use itself, the size of the stream, the velocity of the current, the nature of the banks, the character of the soil, and a variety of other facts.<sup>1</sup> "What constitutes reasonable use," says the court in Wisconsin, "depends upon the circumstances of each particular case; and no positive rule of law can be laid down to define and regulate such use with entire precision, is the language of all the authorities upon the subject. In determining this question, regard must be had to the subject-matter of the use, the occasion and manner of its application, its object, extent, and the necessity for it, to the previous usage, and to the nature and condition of the improvements upon the stream; and so, also, the size of the stream, the fall of water, its volume, velocity, and prospective rise and fall, are important elements to be considered."<sup>2</sup> And the question of the reasonableness of the use of a stream, when it is not settled by custom and is in its nature doubtful, should always be regarded as one of fact, to be determined by the tribunal trying the facts.<sup>3</sup> We may add that the mode and extent to which a riparian owner may use and apply the waters of a stream, as between him and another riparian proprietor, is not

<sup>1</sup> Union Mills Co. v. Ferris, 2 Sawy. 176; Dilling v. Murray, 6 Ind. 324; Mayor of Baltimore v. Appold, 42 Md. 442; Elliot v. Fitchburg R. R., 10 Cush. 191; Thurber

v. Martin, 2 Gray, 394; Timm v. Bear, 29 Wis. 254.

<sup>2</sup> Timm v. Bear, 29 Wis. 254.

<sup>3</sup> Snow v. Parsons, 28 Vt. 459.

measured by what would be reasonably requisite for his particular business, but what is reasonable, having reference to the rights of the other proprietors in the stream, without, by such use, materially diminishing its quantity or deteriorating its quality.<sup>1</sup> And even where a party has a right to the use of a water-course according to his convenience and judgment, and all the right which prescription can confer, still he can exercise that right only in a reasonable manner; and therefore if he uses the water not for his own benefit and convenience, but maliciously or wantonly, to the prejudice of another, he is liable in damages.<sup>2</sup> Finally, it is only between riparian proprietors that the question as to the reasonable use of the water can ever arise.<sup>3</sup>

#### § 141. Reasonable use for manufactures.

[In regard to the use of the water for mechanical or manufacturing purposes, the rule is thus stated: "Each proprietor of land through which a natural water-course flows has a right, as owner of such land, and as inseparably connected with and incident to it, to the natural flow of the stream, for any hydraulic purpose to which he may think fit to apply it; and it is a necessary consequence from this principle that such proprietor cannot be held responsible for any injurious consequences which result to others, if the water is used in a reasonable manner, and the quantity used is limited by, and does not exceed, what is reasonably and necessarily required for the operation and propulsion of works of such character and magnitude as are adapted and appropriate to the size and capacity of the stream, and the quantity of water usually flowing therein."<sup>4</sup> But as a riparian

<sup>1</sup> *Batavia Manuf'g Co. v. Newton Wagon Co.*, 91 Ill. 246; *Union Mill & M. Co. v. Ferris*, 2 Sawy. 196; *Wheatley v. Chrisman*, 24 Pa. St. 298; *Pennsylvania R. R. v. Miller*, 112 Pa. St. 34, s. c. 3 Atl. Rep. 780.

<sup>2</sup> *Twiss v. Baldwin*, 9 Conn. 291.

<sup>3</sup> *Lux v. Haggin*, 69 Cal. 255, 4 Pac. Rep. 925.

<sup>4</sup> *Springfield v. Harris*, 4 Allen, 494, Merrick, J. And see *Davis v. Getchell*, 50 Me. 602. But the di-

owner cannot, by prior appropriation, acquire the right to divert the water-course as against a lower proprietor, so he cannot by such priority acquire a right to consume the entire stream for mechanical purposes, as by converting it into steam.<sup>1</sup> The question whether the use of a stream to carry off manufacturer's waste is reasonable or not, is one of fact for the jury, depending upon the circumstances of the case, such as the size and character of the stream, the purpose of its use, the benefit to the manufacturer, and the injury to the other riparian owners.<sup>2</sup>]

### § 142. Manner of use must be reasonable.

[The maxim, *sic utere tuo ut alienum non lædas*, emphatically applies to riparian proprietors.<sup>3</sup> For example, a riparian proprietor, in using the water of a stream for domestic purposes and watering cattle, has no right to so dam it up as to spread it over a large surface, whereby it becomes lost by evaporation and absorption to an extent to prevent the stream from flowing through the land of the next proprietor, as it would do but for such dam.<sup>4</sup> But a riparian owner may dam the stream in order to

version of a water-course, or a part of it, by an upper riparian proprietor, for manufacturing purposes, without restoring to the channel the excess of water not actually consumed, is an unreasonable exercise of the right to use the water of the stream. *Weiss v. Oregon Iron & Steel Co.*, 13 Or. 496, s. c. 11 Pac. Rep. 255.

<sup>1</sup>*Bliss v. Kennedy*, 43 Ill. 67. In *Garwood v. Railroad*, 83 N. Y. 400, plaintiff was the owner of a mill operated by water-power furnished by a creek. Defendant, (a railroad corporation,) who was a riparian owner above, under a claim of right, diverted the waters of the creek, conveying them by

pipes to reservoirs, whence its locomotives were supplied with water. The jury found, on sufficient evidence, that the water so diverted from the creek was sufficient "to perceptibly reduce the volume of water therein," and to "materially reduce or diminish the grinding power of plaintiff's mill," and that in consequence he had sustained damage to a substantial amount. Held, that plaintiff might recover the damages sustained, and have the diversion enjoined.

<sup>2</sup>*Hayes v. Waldron*, 44 N. H. 580.

<sup>3</sup>*Burwell v. Hobson*, 12 Grat. 322.

<sup>4</sup>*Ferrea v. Knipe*, 28 Cal. 340.

make a pond for ice, and he may drain such pond, and hold back the water until he shall have cleaned out the pond in order that the ice may be pure. Those below cannot complain of such use.<sup>1]</sup>

<sup>1</sup>De Baun v. Bean, 29 Hun, 236.

## CHAPTER VIII.

## USE OF WATERS FOR IRRIGATION.

- § 143. Irrigation of riparian lands—Ellis v. Tone.  
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## § 143. Irrigation of riparian lands—Ellis v. Tone.

We are now brought to the question, how far do the riparian rights of a private riparian proprietor, under the law of California and other states, include the right to use the water of the stream for the purpose of irrigating his land? The only recent decision which deals directly with this question to any extent, or in any manner, is found in the case of Ellis v. Tone,<sup>1</sup> decided in 1881. Unfortunately this case is so reported that it does not throw much light upon the general question. The action was tried before a jury, but the report does not give the entire charge of the court, so that it may be seen upon what general theory of the law, or upon what admitted doctrine, the cause was tried and the recovery had. Certain detached clauses of the charge were

<sup>1</sup>58 Cal. 289. [The editor's review of the Pacific cases decided since the foregoing was written, as well as of numerous others, will be found in §§ 155-159, *infra*.]

excepted to, and certain special instructions were refused, and these alone have been given by the reporter.

The opinion of the court is also confined to an examination of the specific exceptions, and does not enter into any discussion of the general doctrines upon which the case, as a whole, must have rested. The case, however, is the most recent published decision which deals with the right to use water for purposes of irrigation, and we shall state it in substance, by way of introduction to the discussion of this most important question.

The action was brought to recover from defendants damages for diverting water from Mormon slough, a natural water-course, by which plaintiffs were prevented from irrigating their growing crops in 1877. A verdict was rendered in favor of the plaintiffs. Defendants moved for a new trial, which was denied, and they appealed. The facts, as stated in the report, were as follows: Mormon slough or channel heads from and runs out of the Calaveras river east of Stockton, and about four miles northeasterly from plaintiffs' land, and flows thence in a south-westerly direction to the Stockton channel, a distance of about twenty miles. The slough runs through the land of the plaintiffs in two channels. The defendants own land on the Calaveras river, below the point where the Mormon slough runs out of that river. The slough is a natural water-course, having a well-defined channel and banks. In 1850, before the channel of the Calaveras river was filled in by mining *débris*, it (the lower channel of said river) was from four to six feet lower than the bed of the slough, so that the waters of the river did not flow into the slough until the waters of the river had risen from four to six feet. But the channel of the river has since been so filled up by *débris* that, when the water is low, most or nearly all of it runs and has run into and through the slough. That has been the case since 1862, unless prevented by artificial means, so that in dry seasons, or



in the dry season of the year, nearly all of the water ran into the slough; and during the whole of the year water was in the slough, while in the dry season little or none ran in the river below the head of the slough. In the fall of 1876 and winter of 1877 plaintiffs put in a crop of wheat and barley on their land, through which the slough ran as above stated. The plaintiffs made arrangements to irrigate this land in the next spring (of 1877) by damming the north channel of the slough, so as to make the water flow into the south channel, on the banks of which their crop was growing. This arrangement was completed in April, 1877. They then found that defendants had stopped the entrance of the slough by digging a ditch in the bed of the river, and by damming the exit of the slough from the river, so that the water was compelled to flow down the river, instead of flowing, as had been the case for fifteen years, into the slough. In consequence of this the water was cut off from the slough, the plaintiffs were unable to irrigate, and their crop was a failure. Evidence also showed that in the spring of 1877 the defendants had purchased from the Mokelumne Canal Company four hundred miner's inches of water, to be furnished between April 15th and the first of June. This water was taken from the Mokelumne river, and was turned into the Calaveras river at a point above the head of the Mormon slough, and flowed down that river to the lands of the defendants, so that they could use it for purposes of irrigation.

The court held that there was evidence sufficient to sustain the verdict for the plaintiff. The trial court charged the jury as follows: "This is an action brought by the plaintiffs against these defendants, wherein the plaintiffs allege themselves to be the owners of certain lands described in their complaint, and allege that the Mormon slough was a natural stream of water flowing through their lands. If you believe from the evidence that the Mormon slough was a natural stream of water, and that the

water would have flowed through their lands but for the diversion of the natural flow of that water by the defendants, the plaintiffs are entitled to a verdict for whatever damages they may have sustained to their crops, provided they were prepared to use the water, and had made the necessary preparations as they have alleged in their complaint. The measure of damages in this case is the amount of injury to the crops described in the complaint by the act of the defendants in diverting the natural flow of the water, if they did divert it. If, however, the plaintiffs received no damage by any act of the defendants, or they did not divert the natural waters of this stream to the injury of the plaintiffs, then your verdict will be for the defendants." To this paragraph the defendants excepted; and objected on the appeal that it assumed the fact of diversion; that it in effect directed the jury to find a verdict for damages to plaintiffs' crops, no matter from what cause the damages originated; and that it did not give the correct rule of damages. The supreme court held that these objections were without any foundation; that the instruction did leave the question to the jury whether defendants had or had not diverted the water; and that the trial court was not bound of his own motion to state any rule of damage to the jury, but the defendants must request him to lay down such rule as they claimed to be the true one, and, if he refused, then they could except to his refusal.

The defendants requested the trial court to give the following instruction, which the judge refused to give: "A riparian proprietor, who takes water from a channel in which it naturally flows, has no legal right to take it beyond his own land before returning it to its natural channel. So, if the jury believe from the evidence that the natural waters of the Calaveras river and Mormon channel would have flowed in the main Mormon channel (*i. e.*, the north channel which plaintiffs dammed up) after plaintiffs had built their dams, unless diverted by said dams or  
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other means; and if the jury further believe from the evidence that plaintiffs' dam in the main channel (*i. e.*, the north channel) of Mormon slough was not built on their own land for purposes of irrigation, but on the land of one Murphy, whose lands did not adjoin the land of plaintiffs; and unless the jury believe from the evidence that the proprietors of intermediate lands consented to the diversion of said natural water from the main (north) channel of the Mormon slough, by a dam placed therein by plaintiffs, (and such consent should be shown by the evidence,)—then the jury should find for the defendants." The defendants having excepted to the trial judge's refusal to give this instruction, claimed on the appeal that this refusal was error. The supreme court say: "It is urged that in this there was error, because plaintiffs did not show the consent of the intermediate owners of land referred to in the request. As to this, it is only necessary to say that no intermediate land-owner is here objecting to plaintiffs' bringing the water through their lands. As they made no objection, we cannot see that the defendants could make the objection for them, or either of them. No objection appearing, it is proper to conclude that no one of such owners ever objected."

The defendants also requested the trial court to instruct the jury as follows: "The plaintiffs are not in any event entitled to recover damages for the diverting from Mormon channel any waters which were not the natural waters of the Calaveras river, nor for the diverting of any waters in excess of plaintiffs' just and fair proportion of the natural waters of the Calaveras river and Mormon slough. If the jury believe from the evidence that the defendants caused to be turned in and run down the Calaveras river, above Mormon slough, prior to the erection of plaintiffs' dam, and until the first of June, 1877, waters taken from the Mokelumne river; and if the jury further believe from the evidence that the natural waters of the Calaveras river did not

run down the river to the head of Mormon slough in sufficient quantity to irrigate plaintiffs' land in the spring of 1877, and after plaintiffs had constructed their dams,—then the jury should find for the defendants." The court refused to give these instructions, and the defendants excepted. In regard to these exceptions the supreme court said: "The court did, in effect, charge all these propositions in giving the following requests asked by defendants: '*Third.* In no event were the plaintiffs entitled to the use as riparian proprietors of any water except the water which would naturally flow down the Calaveras river and the Mormon slough; and if the jury believe from the evidence that any water was turned into the Calaveras river above the head of the Mormon slough, at the request of the defendants, or any of them, from ditches which drew their water from Mokelumne river, then the plaintiffs cannot recover any damages for being deprived of the use of the water which was so turned into the Calaveras river. *Fourth.* The plaintiffs had not the legal right to use for the purpose of irrigation all of the natural waters of the Calaveras river which flowed down the Calaveras river and Mormon slough. The other riparian proprietors of land on the Mormon slough had a legal right to use such natural waters equally with plaintiffs. The plaintiffs had no legal exclusive right to use such natural waters for the purpose of irrigation in excess of their just and fair proportion thereof. *Ninth.* If the jury believe from the evidence that the defendants, or any of them, caused to be turned into the Calaveras river, above the head of Mormon slough, waters taken from the Mokelumne river, and such waters continued to flow down the Calaveras river from the middle of April until the first of June, 1877, then the plaintiffs cannot recover because the defendants prevented them from using such waters.'"

With respect to other exceptions and objections by the defendants, the supreme court further said: "An exception was re-

served to the following instruction asked by the plaintiffs: 'Every riparian owner upon a stream has a right to use, in a reasonable way, the water of said stream for domestic purposes, for the irrigation of his land, or for propelling machinery, if the quantity of water will warrant such use above the amount required for domestic purposes.' As to this, the counsel for defendants said: 'The plaintiffs were entitled to the reasonable use of the natural waters of the Mormon slough. By reasonable use is meant reasonable *quantity* as well as reasonableness in the *manner* of its use. The vice of the instruction is that the right to use the water is qualified by the reasonable *manner* of its use, and not by an unreasonableness in respect to the *quantity* used.' In our judgment, the criticism of the learned counsel is not warranted. It savors of hypercriticism. The instruction as given embraced *quantity* as well as manner. We do not see that any injury was done to the defendants in giving the instruction *eight*, asked by the plaintiffs. It was in these words: 'In the state of California the right to the use of water becomes fixed after five years' adverse enjoyment of the same.' There was some evidence, in our view, on which such a charge might be predicated. Further, in our opinion, the plaintiffs were entitled to recover if there was a diversion, which seems to have been clearly shown. In fact, the diversion was not denied in the answer, so that the charge objected to was immaterial, and did no injury."

We have thus quoted in full every instruction of the trial court, and every portion of the opinion of the supreme court in this case, which directly or indirectly relates to the riparian rights of riparian owners, or to unlawful diversion of water, or to the general question concerning the right to use the water for purposes of irrigation. All the other instructions as reported, and all the remaining portions of the opinion, deal exclusively with the measure of damages in this particular case, how far the plaintiffs were entitled to recover for the value of the crops which

they would have raised if their land had been irrigated, and by what evidence that value could be established. In this discussion no allusion whatever is made to riparian rights in general, nor to the general right of a riparian proprietor to use the water of the stream for the purpose of irrigating his land.

**§ 144. Limited authority of foregoing decision.**

It is very plain, from the foregoing description and quotations, that the general questions concerning the extent of private riparian rights, and especially concerning the right to use the waters of the stream for irrigation, are not determined by this case, except so far as a doctrine may be regarded as settled when it is tacitly accepted by both the litigant parties at a trial, and its correctness, therefore, is not questioned before or by the appellate court. The instructions of the trial court, purporting to embody the general rules as to the use of water for irrigation by a private riparian proprietor, were not excepted to by the defendants, and the rules thus laid down were therefore assumed to be correct *for this case* by the supreme court on appeal; but such assumption does not *necessarily* establish these rules as correct for all cases,—does not settle them as general rules of the law defining and fixing the rights which belong to private riparian proprietorship. There are other features of this case, as reported, which prevent it from being a final settlement of the important general questions under discussion. In the first place, it does not clearly appear in what relations the two litigant parties, plaintiffs and defendants, were regarded by the court as standing towards each other,—whether they were both regarded as two riparian proprietors upon the same stream, and, therefore, as having equal rights to the use of its waters; or whether the plaintiffs were regarded as riparian proprietors upon one stream, viz., the Mormon slough, and the defendants as appropriating and diverting the water of that stream for the bene-

fit of their land, which was not situated upon its banks. The Calaveras river and the Mormon slough might be regarded as one stream, although divided into two branches, in which case the plaintiffs might be in the position of upper, and the defendants of lower, proprietors on the single stream. The instructions of the trial court seem to have taken this view. On the other hand, the Mormon slough might be regarded as a single stream, and the plaintiffs as riparian proprietors upon it, while the defendants were *wrongfully* diverting and appropriating its waters, because they were not proprietors of land upon its banks. The language of the opinion of the supreme court, already quoted,—“further, in our opinion, the plaintiffs were entitled to recover if there was a diversion,”—tends somewhat to sustain this view as the one taken by that court.

In the second place, the two instructions of the trial court, which purported to embody the general rules concerning the use of water for irrigation, and which were not substantially objected to by the defendants, will be found, on careful examination, not to be entirely harmonious; in fact, they are susceptible of such a construction as will make them directly conflicting. In one of these instructions the trial court said: “The plaintiff had not the legal right to use, for the purpose of irrigation, all of the natural waters of the Calaveras river which flowed down the Calaveras river and the Mormon slough. The other riparian proprietors of land on the Mormon slough had a legal right to use such natural waters equally with the plaintiffs. The plaintiffs had no legal exclusive right to use such natural waters for the purpose of irrigation in excess of their just and fair proportion thereof.” It will be noticed here, in confirmation of what we have already said, that the court does not say “the other riparian proprietors of land on the Mormon slough, *and on the Calaveras river*, had a legal right to use the waters equally with the plaintiffs.” It thus fails to show clearly whether the plain-

tiffs and the defendants were regarded as riparian proprietors on the same stream. But, passing by this criticism, the instruction furnishes a plain, definite rule. It places the rights of all riparian proprietors to use the stream for irrigation upon a perfect equality. No proprietor has any advantage or superior right to use the water for such purpose, by reason of his being located higher up on the stream than others. This rule clearly and unequivocally distinguishes between the use of water for irrigation, and its use for so-called *natural* purposes, viz., domestic purposes and watering of stock. By this rule the right of every riparian proprietor to use the water for irrigation is limited, regulated, and controlled by the *equal* right of every other proprietor on the same stream to use its waters for similar purposes.

It will be remembered that the common-law doctrines distinguish between certain uses of water called *natural* and all others. It is the settled rule that, while a riparian proprietor must use the water in a reasonable manner and to a reasonable amount, he is entitled to take all of the water which is reasonably necessary in manner and amount to supply his *natural* purposes, namely, his domestic purposes and the watering of his stock, even if so much of the water of the stream is thus consumed that there is not a sufficient amount left flowing in its channel to supply the similar uses of the proprietors below him. In this single respect the common law gives a natural superiority of right to a proprietor higher up the stream over one lower down; but the superiority is strictly confined to the natural uses of domestic purposes and watering stock.<sup>1</sup> The real question to be determined is whether the irrigation of lands is one of these natural uses, standing upon the same footing with domestic uses and the watering of stock. The instruction quoted

<sup>1</sup> See *Ferrea v. Knipe*, 28 Cal. 341, 344, per Currey, J.



above most unequivocally answers this question in the negative, and gives one proprietor no preference whatsoever over the other proprietors in the use of the stream for the purpose of irrigation. The second instruction, to which we have referred, seems to put irrigation on the same footing with domestic purposes. This instruction was as follows: "Every riparian owner upon a stream has a right to use, in a reasonable way, the water of said stream for domestic purposes, for the irrigation of his land, or for propelling machinery, if the quantity of water will warrant such use above the amount required for domestic purposes." So far as this instruction can be construed as laying down any rule, it plainly seems to place irrigation and domestic purposes upon the same footing, and, if so, it is conflicting with the doctrine announced in the other instruction previously quoted. We have thus analyzed these instructions, and the rules which they purport to embody, for the purpose of showing that, although tacitly adopted by the supreme court, because not objected to on the trial, they do not furnish any authoritative and final settlement of the questions at issue. The instruction last above quoted is open to the gravest criticism; it mingles up subjects entirely unlike. The use of water for "domestic" purposes necessarily *consumes* it. And yet, if the manner and amount are reasonable, the proprietor may use and thereby consume all that is reasonably necessary, under the circumstances, even though the natural flow of the stream is thus so diminished that there is not left a supply for the proprietors below. The use of water for irrigation also consumes it. It has been claimed that irrigation is a natural use, and that the right of a proprietor to use and consume water for irrigation is the same in nature and extent as the right to use and consume it for domestic purposes and for the watering of stock.

But, on the other hand, the use of water for propelling machinery does not consume it. The settled doctrines of the com-

mon law allow a riparian proprietor to use the water of a stream—the whole stream, if needed—as it passes through his land, for the purpose of propelling machinery, provided he returns the water, undiminished in quantity and undeteriorated in quality, into the natural channel of the stream before it leaves his own land and enters that of the proprietor next below him. Such a use for propelling machinery, under these limitations, cannot possibly injure the other riparian proprietors either above or below him on the same stream. There is therefore no analogy between the use of water for propelling machinery and its use for domestic purposes or for irrigation. These various uses are governed by entirely different rules, and depend upon entirely different considerations. Our review of this case does not touch upon the decision made by the supreme court. That tribunal could, of course, only deal with the questions presented to it by the record,—the questions raised by the exceptions.

### § 145. Tendency of decision in *Ellis v. Tone*.

Although this case of *Ellis v. Tone*, as we have shown by the foregoing examination, is of little value in *settling* the important, general doctrines as to the rights of private riparian proprietors in the law of California, yet it has a certain *tendency* towards such a settlement. It plainly distinguished between the case of a stream running wholly through public land, and that of a stream bordered by the lands of private owners. Although the cause of action arose in 1877, several years after the Civil Code took effect, no allusion whatever is made, by the court or the counsel, to the provisions of the Code relating to water rights. The title of the Code on this subject seems to have been tacitly ignored as inapplicable to such a case. The arguments of the counsel for both parties, as reported, freely cite text-books and decisions based upon and representing the common-law doctrines, but they do not cite the Code. It is probable that the

case, as a whole, proceeded upon the assumption that the Calaveras river and the Mormon slough running out of it formed one stream in contemplation of law, and intended to deal with the rights of the two litigant parties as though both were riparian proprietors upon that single stream; in other words, it intended to lay down rules of law applicable to two proprietors in such a condition. In regard to the use of water for irrigation, the decision, as a whole, seems to deny the right of any riparian proprietor to use all the amount of water which may be reasonably necessary to irrigate his lands, if by such use the water left flowing down the stream is rendered insufficient for the similar purposes of other riparian proprietors. On the contrary, the case seems to regard the right to use the water of a stream for irrigation as belonging alike to all the riparian proprietors upon the stream; that each proprietor is entitled to use, for irrigating his lands, only so much of the water of the stream as is in excess over and above the amounts which are requisite to supply the similar purposes and uses of all the other proprietors upon the same stream. In fact, the right of each riparian proprietor upon any particular stream to use its water for irrigation must depend, among other things, upon the size of the stream, the amount and volume of water naturally flowing down its channel, the number of riparian proprietors upon it, the amount or acreage of the land entitled to irrigation held by each of these proprietors, and other similar considerations. Such, as it appears to us, is the *tendency* of the decision in *Ellis v. Tone*, although it cannot, in our opinion, be said that the case authoritatively and finally decides or settles any of these conclusions.

**§ 146. The question as to irrigation stated.**

We have thus thrown all the light of authority upon the particular but most important question, how far do the riparian rights of private riparian proprietors include the right to use the

water of the stream for the purpose of irrigating their riparian lands under the law of California and of Nevada? The previous discussions upon principle, as well as upon authority, have unmistakably led to the conclusion that this question has not yet been definitely and finally settled by judicial decision. All of the fundamental doctrines which were accepted by both parties in the recent case of *Ellis v. Tone*, and upon which that case was decided, as described in a former section, might be questioned or denied, and might possibly be rejected by a subsequent decision. Any answer which we shall attempt to give, must therefore, to a great extent, be merely speculative. It can only be an expression of our own individual opinion derived from a consideration of general principles, and from the tendency of previous adjudications. It cannot be regarded as a definite statement of the established and accepted rule of law. If we are correct, our opinion will, doubtless, be soon confirmed by the courts. If we are wrong, then our error must run through our whole course of reasoning covering the rights of *private* riparian proprietors, as distinguished from the rights to use public streams, and especially the interpretation which we had given to the provisions of the Civil Code, and some entirely different theory of private water-rights must be adopted by judicial authority. We shall proceed, however, to give in brief terms an answer to the general question formulated above,—an answer which, in our opinion, results directly, and as a necessary inference, from the doctrines which have been established by the unbroken series of decisions made by the supreme court of California, and quoted in our former chapters. Those decisions have been so frequently cited and so fully described, and the doctrines announced by them have been so elaborately discussed, that no more special reference need be made to them as authorities for our conclusions.

The question is, how far do the riparian rights of private ri-

riparian proprietors, by the law of California and of Nevada, include the right to use the waters of the stream for the purpose of irrigating their riparian lands? We shall assume, without restating or rearguing, the positions established in our previous articles,—namely, that the provisions of the Civil Code have no application to private riparian proprietors owning lands on the banks of a private stream, but the water-rights of such proprietors are left untouched and unaffected by the Code; and that the rights of such private riparian proprietors are those recognized, conferred, regulated, and protected by the common-law doctrines on the subject,—doctrines substantially the same as those so fully and carefully stated by the supreme court of Nevada in the case of *Van Sickle v. Haines*.

### § 147. No right to irrigate non-riparian lands.

In the first place, a private riparian proprietor has no right whatever to divert or use any water of the stream for the purpose of irrigating lands which do not adjoin or abut upon the stream,—lands which are not strictly riparian.<sup>1</sup> The appropriation and diversion of the waters of a natural stream, for the benefit of a tract of land not situated upon one or both of its banks, are wholly unknown to the common law. They are a part and parcel of the peculiar system which has grown up in the Pacific communities primarily and mainly from the local customs and

<sup>1</sup> *Gould v. Stafford*, 77 Cal. 66, 18 Pac. Rep. 879. But while an upper riparian proprietor cannot divert water for sale or use on non-riparian lands, or unreasonably use or divert the water to the injury of owners further down the stream, it is error, upon enjoining him from such unauthorized diversion, to require him to permit no water to flow into a canal constructed by him for the purpose of

irrigating non-riparian land, but which, though not so intended, can be used to irrigate his riparian land, and compel him to close up his canal, since he may thereafter desire to use it legitimately, either to water riparian land or to carry off surplus water in time of flood, when no one below him would be injured thereby. *Heilbron v. Seventy-Six Land & Water Co.*, 80 Cal. 189, 22 Pac. Rep. 62.

needs of those engaged in mining; and they are confined entirely to the public streams,—to those streams flowing through the public lands of the United States,—or, under the Civil Code, of the state of California. The common-law doctrines restrict the use of waters of natural streams to the lands bordering on those streams, and the right to use the waters is held exclusively by the private owners of such lands in their character as riparian owners. There is nothing more completely antagonistic to the common-law system, nothing which would more completely destroy the equality and equity of the common distribution of rights among all the private riparian proprietors on any particular stream, than the appropriation and diversion of its waters, by means of ditches or canals, for the benefit of lands not adjoining the stream, by persons who are not, with respect to such lands, riparian proprietors. If a private riparian proprietor owns a tract of land actually bordering on the stream, he may possibly be entitled to use the water for the purpose of irrigating the entire tract, no matter how great may be its extent; how far distant from the stream may be its exterior line; but his right to use a quantity of the water sufficient for that purpose must depend upon other considerations to be mentioned hereafter. It is certain, however, that no person can take water from such a stream for the purpose of irrigating his tract of land which is separated from the stream by the intervening lands belonging to other and riparian proprietors.

#### **§ 148. Prior appropriation gives no exclusive right.**

In the second place, a prior appropriation can give no exclusive right to the use of the water for purposes of irrigation, and no superior right nor preference as to the quantity of the water consumed for such purposes. Whether a person was the very first one who acquired title to lands on the banks of a given stream, and as such sole owner first began to use its wa-

ters, or whether, after many riparian proprietors had acquired their respective titles, he was the first one of them to use its waters, in either case the prior appropriation can give no right to use an unlimited quantity, or an excess in quantity, nor any other relative superiority in the use of the water for irrigation, over all the other private riparian proprietors on the same stream. The doctrine of prior appropriation, as has been shown, is foreign to the common law. So far as recognized by the law of California and of Nevada, it is confined to public streams, and arose from local customs and the peculiar needs of miners, although it was extended, in its application to public streams, to other businesses, occupations, and uses besides mining. The fundamental conception of the common-law system is the purely equitable principle of relative equality of right among all the private riparian proprietors upon the same stream. *Nature* gives to all the riparian proprietors on any stream an advantage, growing out of their location, over other owners whose lands do not adjoin a water-course; and this *natural right* cannot be taken away by the law, although its enjoyment may be interfered with or prevented by arbitrary legislation. [In those states, however, where the common-law doctrine of riparian rights is entirely abrogated, either a riparian owner or any other person may acquire an exclusive right to the use of the water for purposes of irrigation by making a valid prior appropriation thereof. Thus, in Colorado, it is held that a valid appropriation of the waters of a stream, to the exclusion of a riparian owner, may be made for the purpose of irrigation, although the lands to be irrigated are not situated on the banks or in the neighborhood of the stream.<sup>1</sup>]

<sup>1</sup>Hammond v. Rose, 11 Colo. 524, 19 Pac. Rep. 466. See, also, Clough v. Wing, (Ariz.) 17 Pac. Rep. 453;

Stowell v. Johnson, (Utah,) 26 Pac. Rep. 290.

**§ 149. Relative equality of riparian owners.**

The common law recognizes this natural right of all the riparian proprietors on the same stream, resulting thus from their location, and distributes and regulates it among them all according to the equitable principle of relative equality. All have relatively the same rights to enjoy the benefits of the water as it flows by or through their lands, not depending upon the time when the use began, but upon the extent of their riparian lands,—upon the quantity of their lands susceptible of being lawfully benefited by the water. This notion of equality, as has been shown, runs through and shapes the entire system of common-law doctrines concerning the rights to the waters of natural streams. Any legislation which ignores or violates this equitable notion of equality is so far unjust. To this otherwise universal rule the common law, as has been shown, recognizes one partial exception. As the use of water for drinking, both by man and beast, and for other purely domestic and household purposes, is essential to the preservation of life, the common law gives a preference to its use for these so-called natural purposes. To this end a riparian proprietor is allowed to use all the water of a stream reasonably necessary for domestic purposes and watering stock, even though the natural flow of the stream was thereby lessened, and the supply for the other proprietors lower down was diminished. This exception, however, was carefully restricted, and was never extended beyond its reasons. It does not and cannot include irrigation. To permit a proprietor higher up the stream, or a prior appropriator, to have an unrestricted use of water for purposes of irrigation, would be a gross invasion of natural rights, and a virtual destruction of the utility of streams to the entire community of riparian owners through which they flow. This is the view taken by the contending parties, and therefore adopted by the court for the purposes of



that case, in *Ellis v. Tone*; but, as we have shown, it is not definitely settled by that decision.

### § 150. Size of stream.

In the third place, there is nothing in the common-law doctrines, as the supreme court of Nevada have stated in the case of *Van Sickie v. Haines*, which prohibits the use of water for irrigation by the private riparian proprietors on all streams, as a part of their general rights. The fundamental notion being that of relative equality of right among all the proprietors on the same stream, it is evident that, if the natural flow of the water is sufficient to allow each one of them to take an amount sufficient for the needs of his own tract of riparian land, without infringing upon the equal rights of the others, no injury could possibly result from such an appropriation and use. The only difficulty would arise where the natural flow of the stream was not large enough to furnish such a complete and unrestricted supply to every proprietor.

The common law permits each proprietor to use the water of a stream, as it flows by or through his own land, for any purpose, like the propelling of machinery, which does not consume it to any substantial extent. But a use which necessarily consumes the water—like that for purposes of irrigation—lessens the natural flow of the stream, and therefore tends to invade the equal rights of other riparian proprietors. If, however, after any proprietor has used and consumed all the water which he reasonably needs for the irrigation of his own land, there is still left an amount flowing down the stream adequate for the similar needs of all the other riparian proprietors below him, the result of his act would at most be a *damnum absque injuria*. On the larger streams of the state, therefore, in which the natural flow of water is considerable and is constant throughout all seasons of the year, irrigation might be resorted to, it would seem, by

the private riparian proprietors, without any practical violation of the common-law doctrines. On the minor streams, in which the natural flow of water is small and inconstant, varying with different seasons, the difficulty is much greater. In fact, it seems hardly possible for a proprietor upon such a small and varying stream to consume a quantity of the water sufficient for the irrigation of his own land, without thereby lessening the natural flow to such an extent as to invade the equal rights of the other proprietors.

### § 151. Reasonable use for irrigation.

Finally, it is very plain that the only right of a private riparian proprietor to appropriate the water of the stream for the purpose of irrigation, which is consistent with the common-law doctrines, is a right which belongs in relative equality to all the proprietors alike. The quantity of water which any proprietor may divert must depend, in the first place, upon the extent of his own land and the amount reasonably requisite for its irrigation; and, in the second place, upon the extent of the lands held by all the other riparian proprietors, and the amount reasonably requisite for their irrigation; and, in the third place, upon the size of the stream itself, and its capacity to furnish a supply for all these proprietors. Or, to state the same position in other words, each riparian proprietor is only entitled to use, for the purpose of irrigating his own land, that portion of the stream which is in excess over the amount thereof to which all the other proprietors are equally entitled for the purpose of irrigating their own tracts of land.<sup>1</sup> Any other rule than this must necessarily vio-

<sup>1</sup>[In *Messinger's Appeal*, 109 Pa. St. 285, 4 Atl. Rep. 162, it was said: "It is a well-recognized rule that a riparian proprietor may, *jure naturæ*, divert water from a stream for domestic purposes and

for the irrigation of his land; but to what extent he may do the latter in any particular case, depends on whether it is reasonable, having due regard to the condition and circumstances of other propri-

late natural justice and equity. It is plain, however, that when the stream is small, where the flow of water is varying, where its amount is insufficient to furnish a constant and considerable excess over and above the needs of all the riparian proprietors, this common-law rule can only be a very imperfect and impracticable guide; it needs to be supplemented and aided by positive legislation. The character and object of such legislation we shall attempt to explain in the succeeding and final chapter.

### § 152. Easements and adverse user.

All the foregoing discussion concerning the rights of private riparian proprietors has assumed and treated their rights as they exist at the law, unaffected by agreement or other conduct among the proprietors themselves. It is hardly necessary to state that any private riparian proprietor upon a stream may obtain, as against other proprietors, special rights to use the water, in the nature of easements or servitudes, far other and greater than those which the law confers upon him simply as a riparian proprietor. Thus, for example, he may obtain, by grant from other proprietors, or by prescription against them, the exclusive right to any portion of the waters of a stream for purposes of irrigation; and thus a prior appropriation may by prescription ripen into a lawful right, as against all the other riparian proprietors, to use the entire waters of a stream for any beneficial purpose. It is not our design to enter into any discussion of the servitudes which may thus be acquired by grant or by prescription. The

etors on the stream; he should not so divert it as to destroy or materially diminish or impair the application of the water by other proprietors." The right of a proprietor to use a due proportion of the water for irrigation cannot be

affected by the grant of a right to divert the waters of the same stream, made by an adjacent proprietor. *Anaheim Water Co. v. Semitropic Water Co.*, 64 Cal. 185, 30 Pac. Rep. 623.]

law on this subject is in no manner peculiar to these Pacific communities, except in the remarkably short statutory period of adverse user—five years—adopted by the Code of California.

**§ 153. Relation of irrigation to the natural wants.**

[Water for irrigation is not a natural want in the same sense that water for quenching thirst is, which a riparian proprietor may satisfy without regard to the rights and needs of proprietors below. Thus a riparian owner may lawfully divert the water of a stream, for the purpose of irrigating his land, to a reasonable extent, but in no case may he do this so as to destroy, or render useless, or materially affect, the application of the water by other riparian proprietors.<sup>1</sup> Now, it follows from this principle, in the first place, that a riparian owner cannot divert *all* the water of a stream, for the purpose of irrigating his lands, without regard to the rights of other owners, even though the whole stream might be needed for the sufficient accomplishment of his purpose. This question was presented in the most direct and explicit manner in the recent case of *Learned v. Tange-man*.<sup>2</sup> The action was brought by a private riparian proprietor against another private riparian proprietor, having lands situated upon the banks of the same stream higher up than the lands of the plaintiff. The defendant had diverted the water of the stream for the purpose of irrigating his own riparian lands, and the plaintiff complained that he had diverted and used more than the amount to which he was entitled, and had thereby deprived the plaintiff of the portion of the waters of the stream to which *he* was entitled for the irrigation of his own riparian land. At the trial the judge instructed the jury that, "if they believed from the evidence that the defendant was a riparian proprietor, and used the water of the stream for the purpose of irrigating

<sup>1</sup>Union Mill Co. v. Ferris, 2  
Sawy. 176.

<sup>2</sup>65 Cal. 334, s. c. 4 Pac. Rep.  
191.

his lands, and used no more than was necessary for that purpose, and returned the surplus water after such use into the channel, then they should return a verdict for the defendant." It is perfectly evident that this instruction of the trial court was given upon the assumption that the right of a riparian proprietor to use the water of a stream for the irrigation of his lands is identical and co-extensive with the natural right of a riparian proprietor to use the water for watering his cattle, for drinking, and for other strictly domestic purposes; that, in the one case as well as in the other, a riparian proprietor is entitled, by the law, to divert and consume all the amount of the stream which may be reasonably necessary for his purposes, even though a sufficient quantity is not left remaining to flow down the channel for similar needs of the riparian proprietors below him. If this assumption of the lower court had been correct, then the instruction to the jury, as given in this case, would undoubtedly have stated the rule of law applicable to the facts with substantial accuracy. But the decision of the supreme court shows, in the clearest and most positive manner, that the assumption was incorrect, and that the right to use water for irrigation is not identical or co-extensive with the right to use it for watering cattle and other like domestic purposes. The supreme court, after quoting the instruction to the jury as given above, proceed to condemn it in the following language: "This (instruction) was error, for by it the jury were in effect told that the defendant was entitled to divert and use *all* of the water of the stream, if necessary for the irrigation of his land, without regard to the wants or necessities of the other riparian proprietor." The judgment was therefore reversed, and a new trial of the cause was ordered.<sup>1</sup>

<sup>1</sup> [The foregoing account of the case of *Learned v. Tangeman* is in the language of Professor Pomeroy, and is taken from an article

which appeared in the *West Coast Reporter* after the close of the series which forms the basis of the present work. ED.]

But, in the second place, we may go further than this, and lay down the rule that no one has a right to use the waters of a stream for irrigation to an extent materially impairing the right of another riparian proprietor to the reasonable use of the same for the purpose of supplying his natural wants and domestic necessities unless he has gained this right in some mode known to the law, as by grant or prescription. In other words, irrigation is *subordinate* to the natural wants. "The right to irrigate, when not indispensable, but used simply to increase the products of the soil, would be subordinate to the right of a co-proprietor to supply his natural wants, and those of his family, tenants, and stock; as to quench thirst, and to the right to use the water for necessary domestic purposes. Hence, whether the use of the water for purposes of irrigation is reasonable and lawful as against another would depend upon the facts of the particular case. If the stream should be sufficiently large to admit of necessary irrigation without unreasonably impairing the rights of other proprietors, then it would be reasonable and lawful; otherwise it would not."<sup>1</sup> Hence, when the stream is small, and does not furnish water more than is sufficient to supply the natural wants of the different proprietors living on it, *none* of the proprietors can use the water for irrigation.<sup>2</sup> It is

<sup>1</sup>Baker v. Brown, 55 Tex. 377. In Rhodes v. Whitehead, 27 Tex. 304, it was said: "It may be admitted that the purpose of irrigation is one of the natural uses, such as thirst of people and cattle, and household purposes, which must absolutely be supplied. The appropriation of the water for this purpose would therefore afford no ground of complaint by the lower proprietors if it were entirely consumed." But this decision was practically overruled by Baker v. Brown, *supra*. In Fleming v. Davis, 37 Tex. 173, it was said that

the irrigation of land, however beneficial in some portions of the state, is not one of the natural wants which will justify the owner of a head-spring in exhausting the water which flows from it, to the injury of proprietors lower down on the natural channel of the stream. The maxim, *sic utere tuo ut alienum non ledas*, applies. The case of Tolle v. Correth, 31 Tex. 362, is not understood to have decided a contrary doctrine.

<sup>2</sup>Evans v. Merriweather, 3 Scam. 492.

in this light that we must understand the language of the supreme court of Pennsylvania, where it is said: "Whenever so much of the volume of water is obstructed as to be plainly perceptible in its practical uses below,—whenever the channels, which before were filled, exhibit the loss of the accustomed fluid,—an injury is committed for which an action may be sustained, though it may not have been actually used by the lower proprietor."<sup>1</sup>]

### § 154. Summary of principles.

[It has thus been made to appear that there is no right to use the water for the irrigation of non-riparian lands; that a prior appropriation can give no exclusive right to the use of the waters for irrigation, and no superior right as to the quantity of water that may be consumed in that manner; that the equitable principle of relative equality must be preserved between all the riparian owners; that it is a part of the general riparian right to use the water for irrigation, if the size of the stream is such that no injury is thereby done to any other proprietor; that irrigation is not one of the natural wants, for which the whole stream may be consumed if necessary, but is subordinate to these uses. We have now to inquire whether, aside from the foregoing specific principles, there is any general rule of law, applicable to all cases alike, governing the riparian right of irrigation. As a result of all the authorities, it may be stated that the only rule which admits of general application is this: The use of water for irrigation must in all cases be *reasonable*, regard being had to the rights and needs of all the other proprietors on the same stream; and reasonableness is a question of fact, to be determined upon all the circumstances of the particular case. In order that this may appear more clearly, it

<sup>1</sup>Miller v. Miller, 9 Pa. St. 74.

will be necessary to review the decisions on this subject at some length.]

**§ 155. Irrigation—The English authorities.**

[In regard to the right of a riparian proprietor to use the water of the stream for irrigation, the rule in England appears to be that he may do so, provided he restores the water to its channel in a volume substantially undiminished.<sup>1</sup> The most important of the cases dealing with this topic is that of *Embrey v. Owen*, in which Parke, B., observed: "On the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil, abutting on one part of the stream, should irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water, though there was no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose. On the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into the stream in order to water his garden, or allow his family or his cattle to drink it. It is entirely a question of *degree*, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not."<sup>2</sup>

The supreme court of California, however, has said that "*a priori* it would be expected that the decisions in Great Britain and Ireland would not much assist the inquiry, since, owing to the humidity of the climate of those islands, it must rarely hap-

<sup>1</sup>*Embrey v. Owen*, 6 Exch. 352; *Swindon Water-Works v. Wilts Canal Co.*, L. R. 7 H. L. 697; *Earl of Sandwich v. Great Northern Ry.*, L. R. 10 Ch. 707, 711; *Samp-*

*son v. Hoddinott*, 1 C. B. (N. S.) 590; *Miner v. Gilmour*, 12 Moore, P. C. 156; *Norbury v. Kitchin*, 9 Jur. (N. S.) 132; 1 Add. Torts, § 89.

<sup>2</sup>*Embrey v. Owen*, 6 Exch. 352.



pen that any use for irrigation can be *reasonable*; and for any purpose the use must be reasonable."']

### § 156. French law.

[It may here be remarked, by way of illustration, that, by the laws of France, every proprietor of land bordering on a running stream may use it for the purpose of irrigating his land, and, when his estate is intersected by such water, he may divert it for purposes of irrigation, on condition that he restore it at the boundary of his property to its ordinary channel. And, in all disputes respecting the right to take water from running streams, the courts are enjoined to reconcile as much as possible the interests of agriculture with the respect due to property and the rights of individuals.<sup>2</sup> But the court of last resort in France has decided that the upper riparian proprietor on a stream of running water has no right to consume the entire stream, to the prejudice of the lower proprietor, even in cases where the entire volume of water would not be sufficient for the needs of his estate, *i. e.*, for the complete irrigation of his own property. And it is said that the judges must regulate the use of the water, as between the two riparian owners, and that they cannot escape from the obligation of so doing, on the pretext that the physical division of the water would destroy the rights of both.<sup>3</sup>]

### § 157. Review of the American authorities.

[On examining the decisions in the eastern states, and the opinions of the text writers, we shall find, notwithstanding some diversity of language, the same thread of principle running through them all, viz., that the use must be reasonable, due re-

<sup>1</sup> *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 757.

<sup>2</sup> Code Napoleon, liv. 2, Nos. 640-645. See 1 Add. Torts, § 89.

<sup>3</sup> Bulletin de la Cour de Cassation, vol. 63, (1861,) p. 266.

gard being had to the equal rights of all the riparian owners. This will sufficiently appear from the following extracts. In an early Massachusetts case it is said: "A man owning a close on an ancient brook may lawfully use the water thereof for the purposes of husbandry, as watering his cattle, or irrigating the close; and he may do this either by dipping water from the brook, and pouring it upon his land, or by making small sluices for the same purpose; and, if the owner of a close below is damaged thereby, it is *damnum absque injuria*."<sup>1</sup> And in an early case in Connecticut it was said: "The defendant had right to use so much of said water, passing through his land, as to answer all necessary purposes, to supply his kitchen, and for watering his cattle, etc.; also he had right to use it for beneficial purposes, such as watering and enriching his land. But this right hath restrictions, and must be so exercised as not to injure the plaintiff, who lies next below, and who hath right to have the surplus flow into his land in the natural channel."<sup>2</sup>

Chancellor Kent is sometimes quoted as proving that water cannot be employed for irrigation, sometimes as proving that it may be. His language is as follows: "Streams of water are intended for the use and comfort of man, and it would be unreasonable, and contrary to the general sense of mankind, to debar any riparian proprietor from the application of water for domestic, agricultural, or manufacturing purposes, provided the use of water be made under the limitation that he do no material injury to his neighbor below him, who has an equal right to the subsequent use of the same water."<sup>3</sup> On this passage the supreme court of California makes the following pertinent observations: "It seems to us that the foregoing (although a very distinct statement of the general proposition) ought not to be taken literally, unless the words 'material injury' be impressed with

<sup>1</sup> *Weston v. Alden*, 8 Mass. 136.      <sup>2</sup> *Perkins v. Dow*, 1 Root, 535.

<sup>3</sup> Kent, Comm. 429.

a signification the equivalent of a substantial deprivation of capacity in a lower proprietor to employ the water for useful purposes. The adjective is prefixed to 'injury,' and the words seem to have reference to the enjoyment of the use by the inferior owner, not to his mere abstract right to the use as against others than riparian owners, and to intimate that he cannot complain of a reasonable exercise of the use by another who possesses the general right in common with himself. The passage, as a whole, may be fairly said to convey the idea that water may be used for agricultural or manufacturing purposes when such use does not materially deprive the lower proprietor of water, either for drinking or for agriculture."<sup>1</sup>

In an early New York decision it is said: "The defendant has a right to use so much as is necessary for his family and his cattle, but he has no right to use it for irrigating his meadow, if thereby he deprives the plaintiff of the reasonable use of the water in its natural channel. The evidence shows that the defendant has appropriated the whole water to his own use, and he seems to suppose that he possesses that right."<sup>2</sup> Again, it is said that the riparian proprietor "may make a reasonable use of the water itself, for domestic purposes, for watering cattle, or even for irrigation, provided it is not unreasonably detained or essentially diminished."<sup>3</sup>

Some of the earlier cases, it will be perceived, do not make a very clear distinction between the natural and artificial uses of the water, being even disposed to class irrigation among the former. But the later authorities announce the rule with more discrimination. Thus, in *Gillett v. Johnson*,<sup>4</sup> Butler, J., remarks: "The right of the defendant to use the stream for purposes of irrigation cannot be questioned. But it was a limited right, and one

<sup>1</sup>*Lux v. Haggis*, 69 Cal. 255, 10 Pac. Rep. 756.

<sup>2</sup>*Arnold v. Foot*, 12 Wend. 330.

<sup>3</sup>*Blanchard v. Baker*, 8 Me. 253, 266.

<sup>4</sup>30 Conn. 180.

which could only be exercised with a reasonable regard to the right of the plaintiff to the use of the water. It was not enough that the defendant applied the water to a useful and proper purpose, and in a prudent and husband-like manner. She was also bound to apply it in such a reasonable manner and quantity as not to deprive the plaintiff of a sufficient supply for his cattle." So in a New Jersey decision it is held that the right of every riparian owner to use the water flowing through his land for its proper irrigation is subject to the limitation that his use for that purpose must be such as not essentially to interfere with the natural flow of the stream, or essentially and to the material injury of the proprietors below to diminish the quantity of water that goes to them.<sup>1</sup> And the court in Massachusetts has given a satisfactory discussion of the subject, from which we quote as follows: "What is a just and reasonable use may often be a difficult question, depending on various circumstances. To take a quantity of water from a large running stream for agricultural or manufacturing purposes would cause no sensible or practicable diminution of the benefit to the prejudice of a lower proprietor; whereas, taking the same quantity from a small running brook, passing through many farms, would be of great and manifest injury to those below who need it for domestic supply or watering cattle; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case, and not in the former. It is therefore, to a considerable extent, a question of degree; still the rule is the same: that each proprietor has a right to a reasonable use of it for his own benefit, for domestic use, and for manufacturing and agricultural purposes. It has sometimes been made a question whether a riparian proprietor can divert water from a running stream for purposes of irrigation; but this, we think, is an abstract question, which

<sup>1</sup>Farrell v. Richards, 30 N. J. Eq. 511.

cannot be answered either in the affirmative or negative, as a rule applicable to all cases. That a portion of the water of a stream may be used for the purpose of irrigating land, we think is well established as one of the rights of the proprietors of the soil along or through which it passes; yet a proprietor cannot, under color of that right, or for the actual purpose of irrigating his own land, *wholly* abstract or divert the water-course, or take such an unreasonable quantity of water, or make such an unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it if not diverted or used unreasonably. The point may, perhaps, be best illustrated by extreme cases. One man, for instance, may take water from a perennial stream of moderate size, by means of buckets or a pump,—for the mode is not material,—to water his garden. Another may turn a similar current over a level tract of sandy soil of great extent, which in its ordinary operation will nearly or quite absorb the whole volume of the stream, although the relative positions of the land and stream are such that the surplus water, when there is any, is returned to the bed of the stream. The one might be regarded as a reasonable use, doing no perceptible damage to any lower proprietor, while the other would nearly deprive him of the whole beneficial use, and yet in both the water would be used for irrigation.”<sup>1</sup>]

**§ 158. Review of authorities continued — The Pacific cases.**

[When we come to examine the later decisions of the courts on the Pacific coast, we shall find no repudiation of the rule thus deduced from the common law. On the contrary, the same

<sup>1</sup>Elliot v. Fitchburg R. Co., 10 Cush. 193-195. See, further, Anthony v. Lapham, 5 Pick. 175; Newhall v. Ireson, 8 Cush. 595; Evans

v. Merriweather, 3 Scam. 495; Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 South. Rep. 78; Washb. Easem. 234; Gould, Waters, § 217.

principle has been accepted as determinative, and has been applied and carried out to its legitimate conclusions; and this with so much certainty and emphasis that the question must be regarded as definitely settled in these states until legislation shall intervene. Thus, in a recent Nevada decision, Chief Justice Hawley remarks: "When it is said that such use must be made of the water as not to affect the material rights of other proprietors, it is not meant that there can be no diminution or decrease of the flow of water; for, if this should be the rule, then no one could have any valuable use of the water for irrigation, which must necessarily, in order to be beneficial, be so used as to absorb more or less of the water diverted for this purpose. The truth is that, under the principles of the common law in relation to riparian rights, if applicable to our circumstances and condition, there must be allowed to all, of that which is common, a reasonable use."<sup>1</sup>

In the important case of *Lux v. Haggin*,<sup>2</sup> decided by the supreme court of California in 1886, the rule is tersely laid down as follows: "By our law the riparian proprietors are entitled to a reasonable use of the waters of the stream for the purpose of irrigation. What is such reasonable use is a question of fact, and depends upon the circumstances appearing in each particular case." The court continued: "The question whether the use is reasonable is not so much whether the water below is diminished thereby, as whether the lower proprietor is materially *injured* by the diminution,—injured by not receiving the benefit in due proportion of the enjoyment to which he and the other proprietors are entitled. It is obvious that the use of water for the purpose of irrigation always involves some

<sup>1</sup> *Jones v. Adams*, 19 Nev. 78, 6 Pac. Rep. 442. See, also, *Barnes v. Sabron*, 10 Nev. 217; *Swift v.*

*Goodrich*, 70 Cal. 103, 11 Pac. Rep. 561.

<sup>2</sup> 69 Cal. 255, 10 Pac. Rep. 755-764.

loss by evaporation and absorption, and must often result in a sensible and clearly perceptible reduction of the quantity in the channel. An entire diversion of a water-course by an upper riparian proprietor, (or a diversion of a part of it,) for irrigation, without restoring to the channel the excess of the water not actually consumed, is never allowed. Whether or not a *diversion* of water is reasonable, is a question not so much as mentioned by any writer or judge. The very proposition assumes the right of the proprietor above to use the water for his own purposes, to the *exclusion* of the proprietors below,—a proposition inconsistent with the doctrine universally admitted, that all proprietors have the same rights.” In the same case, after an elaborate review of the authorities upon this question, the court sums up its conclusions as follows: “The reasonable usefulness of a quantity of water for irrigation is always relative. It does not depend on the convenience of or profitable results to the particular proprietor, but upon the reasonable use, reference being had to the needs of all the other proprietors on the stream. It depends, in other words, on all the circumstances. We anticipate the objection that this is not an absolute rule at all; but, as said by the judges in the opinions quoted from, the very nature of the common right is such that a precise rule as to what is reasonable use by any one proprietor for irrigation cannot be laid down. A stream may be so small that any use for irrigation may deprive all the others of any like use; and the same may be true of a larger stream, where the use is by several of a large number of proprietors. The effect might be that, while there might be sufficient water to supply several for irrigation, there would not be enough for all, and so all might be deprived of the benefit. But the private interests of all would in most cases, if not in every case, lead to an avoidance of the supposed evil. It is not to be doubted that the riparian proprietors would settle by convention upon a plan by

which each could secure a reasonable use for irrigation purposes; as by authorizing each to stay the flow at recurring periods, or otherwise distributing it for their mutual and common benefit. The right of the riparian proprietors to a reasonable use of the water of the stream for purposes of irrigation is recognized in many of the California cases hereinbefore referred to.”<sup>1</sup> In the case of *Stanford v. Felt*,<sup>2</sup> it was ruled that the question, whether or not the use and detention of the waters made by the upper proprietor for domestic and other purposes is reasonable, is a question of fact to be determined in the trial court. And in *Gould v. Stafford*,<sup>3</sup> it is said that while the upper riparian proprietor may use a reasonable amount of the water of a natural stream to irrigate his riparian land, he cannot use *all* of it for that purpose; nor can he use *any* of the water for the purpose of irrigating land not riparian.

In one of the latest cases in California, where the plaintiffs alleged that they were entitled to all the water of the stream, and defendants denied that they were entitled to any of it, and the court found that plaintiffs were entitled to a portion of the water only, and that, to make the water available for irrigating purposes, it was necessary that the full flow of the stream be used at once, it was held that there was no error in the decree apportioning to plaintiffs the full flow of the water during one-half of each week, and to defendants such flow during the remaining half of each week.<sup>4</sup> In this case the court observed: “According to the common-law doctrine of riparian ownership, as generally declared in England and in most of the American states, upon the facts in the case at bar, the plaintiffs would be entitled to have the waters of Harrison canon continue to

<sup>1</sup> *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 763.

<sup>2</sup> 71 Cal. 249, 16 Pac. Rep. 900.

<sup>3</sup> 77 Cal. 66, 18 Pac. Rep. 879.

<sup>4</sup> *Harris v. Harrison*, 93 Cal. 676, 29 Pac. Rep. 325.



flow to and upon their land as they were naturally accustomed to flow, without any substantial deterioration in quality or diminution in quantity. But in some of the western and southwestern states and territories, where the year is divided into one wet and one dry season, and irrigation is necessary to successful cultivation of the soil, the doctrine of riparian ownership has by judicial decision been modified, or rather enlarged, so as to include the reasonable use of natural water for irrigating the riparian land, although such use may appreciably diminish the flow down to the lower riparian proprietor; and this must be taken to be the established rule in California, at least where irrigation is thus necessary. *Lux v. Haggin*, 69 Cal. 394, 10 Pac. Rep. 674. Of course, there will be great difficulty in many cases to determine what is such reasonable use; and 'what is such reasonable use is a question of fact, and depends upon the circumstances appearing in each particular case.' *Lux v. Haggin*, *supra*. The larger the number of riparian proprietors whose rights are involved, the greater will be the difficulty of adjustment. In such a case, the length of the stream, the volume of water in it, the extent of each ownership along the banks, the character of the soil owned by each contestant, the area sought to be irrigated by each,—all these and many other considerations must enter into the solution of the problem; but one principle is surely established, namely, that no proprietor can absorb all the water of the stream, so as to allow none to flow down to his neighbor. In the case at bar only the rights of two riparian proprietors are to be considered. None other are involved. And the amount of water in the stream is so small that it is apparent that defendants could not use it for any useful irrigation without practically absorbing it all, and leaving none to flow down to plaintiffs' land. There was sufficient evidence to warrant the finding

of the court that in order to irrigate, 'it is necessary that the full flow of the stream be used at once.' But defendants, as well as plaintiffs, were entitled to a reasonable use of the water for irrigation; and the rights of either could be declared or preserved by an attempted division of the flow of the water without reference to time. The only way, therefore, to preserve those rights, and to render them beneficial, was to decree to the parties the use of the full flow of the stream during alternate periods of time; and we do not see why the court could not decree a division of the use of the water according to that method, when there was no other method by which it could be done. And that the division was a just one, and not erroneously determined upon, seems clear. The evidence showed that the arable and irrigable land of each party was about equal in area; and there is no contention that the division was not equitable, provided that all the other facts were correctly found by the court."

In the state of Texas, where, at least in certain portions, the same climatic and physiographical conditions exist as in some of the states of the Pacific slope, the privilege of an upper riparian proprietor, in respect to the use of the water for the purpose of irrigation, has been carried to an extent beyond that hitherto recognized in any other jurisdiction. In one of the earlier cases it was held that such a proprietor may divert the stream and cause it to overflow and irrigate his land, provided it resumes its natural channel before it enters the land of the lower owner; and he is not liable for injury to such lower owner, unless he uses the stream *wantonly and maliciously* and takes more water than is necessary for agricultural purposes.<sup>1</sup> And a late decision reaffirms the rule thus stated. "It seems to be the rule of the common law," says the court, "that a riparian

<sup>1</sup>Tolle v. Correth, 31 Tex. 362, 98 Am. Dec. 540.

owner has no right to use the water of the stream for irrigating his lands, provided it interferes with the uses of the water by those who own the lands upon the stream below. That this is a proper rule in England, and in those states where the rain-fall is sufficient for the purpose of agriculture, we freely concede; but we are of opinion that in those sections where irrigation is necessary to the successful pursuit of farming, it should not apply. What is not a necessary use in one case becomes necessary in the other. It was so held in *Tolle v. Correth*, 31 Tex. 365; and though this decision was criticized in the subsequent case of *Fleming v. Davis*, 37 Tex. 173, we are of opinion that it recognizes a correct rule of law as applied to the present case. We think it a matter of common knowledge that there are portions of our state where the business of agriculture cannot be successfully prosecuted through successive years except by irrigation; and it is to be inferred from the allegations of the petition that the section where the stream in controversy is situated is of that character. We think, therefore, that the defendants had the right to divert the water which flowed in the stream along or through their lands for the purpose of irrigating them, although the effect of such use was to leave the plaintiff corporation an insufficient supply for the same purpose. Whether they had the right to divert the *whole* of it, and leave an insufficient supply for the *ordinary* use of the lower riparian owners, we need not in this case determine.”<sup>1</sup>

### § 159. Surplus water must be restored.

[Where a riparian owner diverts the water of the stream for the purpose of irrigation, without returning the surplus into the natural channel, whereby the owner of land below, en-

<sup>1</sup>*Mud Creek Irr. Co. v. Vivian*, 74 Tex. 170, 11 S. W. Rep. 1078.

titled to use the water in the same manner, is deprived of his privilege, an action lies.<sup>1</sup>]

<sup>1</sup>Anthony v. Lapham, 5 Pick. 175; Stafford, 77 Cal. 66, 18 Pac. Rep. 879.  
Cook v. Hull, 3 Pick. 269; Blanchard v. Baker, 8 Me. 253; Gould v.

## CHAPTER IX.

### SUGGESTIONS FOR LEGISLATION ON RIPARIAN RIGHTS.

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#### § 160. Need of statutory regulation.

In concluding our discussion upon water rights in the Pacific communities, we purpose to offer a few observations or suggestions concerning the legislation which should be enacted in the states of California and Nevada for the more complete regulation and protection of these rights. We have already given a full synopsis of the statutory systems adopted in all the other states and territories of the Pacific coast embraced within our general review; and, as before stated, we shall enter into no discussion of these statutes. As those states and territories become more settled by an agricultural population, the practical effect of their legislative methods will become known, and some satisfactory judgment can be formed as to their efficacy. At present any discussion of them might be regarded as speculative, al-

though the results which they must inevitably produce are, in our opinion, perfectly clear. Confining ourselves, therefore, to the two states of California and Nevada, if we are correct in our conclusions concerning the rights of private riparian proprietors upon natural streams, and especially upon their right to use the waters thereof for purposes of irrigation, it is plain that some legislation is needed, not to define and establish the rights, but to protect and regulate their exercise within certain limits.

### § 161. Irrigation — Common-law rules inadequate.

Assuming as true, what we think has been shown to be established by judicial authority, that the general common-law doctrines on the subject apply to and determine the rights of private riparian proprietors, those doctrines are sufficient of themselves to regulate the use of water, by private riparian proprietors, for all other ordinary purposes except that of irrigation. The common-law rules concerning the use of water for milling and manufacturing purposes, and for all those purposes termed "natural,"—domestic and household consumption, and the watering of stock,—are simple, plain, equitable, and just. No fault has ever been found with their practical operation; they are suited to all communities and circumstances; no legislation is needed to render them effective; any legislation interfering with their free control would be injurious. With irrigation the case is otherwise. The use of the waters of natural streams for irrigation is, in many respects, the most important of all possible uses, in these states. Without irrigation the agricultural resources of the soil cannot be developed; with a sufficient supply of water for irrigation, there are hardly any accessible portions of these states which cannot be made profitably productive. The problem is, to benefit as large a portion of the agricultural population as possible, by affording the means of irrigating their lands, without invading and violating the private natural rights

of any class of proprietors. The use of water for purposes of irrigation is practically unknown to the common law. While the equitable principles of the common law may, without any alteration, comprehend the use of water for purposes of irrigation, yet the special rules developed by common-law courts from those principles have not dealt with irrigation. In applying these established doctrines of the common law to the use of water for irrigation, the aid of statutory legislation is clearly needed. If the rights of the private riparian proprietors upon the same stream to use its water for irrigation were correctly stated in our last chapter, it is plain that some practical, simple, and comprehensive method is necessary to settle authoritatively the relative rights of all the proprietors upon any particular stream, and the relative amounts or proportionate quantities of its water which they are all entitled to take and consume. The general doctrine that each is only entitled to the excess over and above that which all the others are entitled to take, is simply the foundation. How that excess is to be actually ascertained and apportioned to each riparian proprietor *before he takes the water from the stream* is the difficulty; and it is a difficulty which can only be obviated by statutory legislation.

### § 162. Contents of proposed statute.

Adopting the equitable doctrines of the common law as its basis, the sole purpose of the legislation should be to furnish a practical mode by which these doctrines can be applied to the use of water for the irrigation of lands. To this end the provisions of the statute should not consist of vague generalities, merely defining some general rights, and leaving all the practical working and effects of the system to be settled by a long series of judicial decisions. They should be detailed, specific, and minute. The statute should be most carefully drawn so as to provide a plain, certain, inexpensive, and practical system regulating the

exercise by every riparian proprietor upon any stream of his right to use the waters thereof for purposes of irrigation; determining the relative amounts of the water to which all of the proprietors are entitled under every condition of circumstances; the proportionate amounts when the whole flow of the stream is not sufficient to furnish a full supply to all; the times and order in which the water may be taken; and all other similar matters. The statutory provisions should be so clear and definite that there could be no reasonable doubt as to the extent of each proprietor's right under any ordinary circumstances; and they should give a simple and effective means of enforcing these rights and regulating their exercise, through the interpretation of local agents or officials representing the whole body of riparian proprietors upon any particular stream, without the necessity of a resort to the courts, and to actions for damages or for injunctions, as the only means of protecting the rights or preventing their invasion.

### § 163. Essential nature of projected law.

Without dwelling any further upon its external form, we proceed at once to the most important inquiry, what should be the essential nature of this legislation? We submit, as its fundamental conception, that such legislation should recognize, be founded on, and carry out *natural laws and natural rights*. Any attempt to violate natural and economic laws and rights, to confer a supposed benefit upon certain classes of persons by legislation which invades and abrogates the *natural* rights, resulting from natural and economic laws, held by other persons, must be injurious to society as a whole, and can produce no real good to any portion of it. In the second place, the legislation should interfere as little as possible with existing and established private rights of property. Numerous private riparian proprietors are located upon nearly all the important streams in this state;



the lands upon the banks of some of these streams are probably all, or nearly all, held by private owners. The rights of all these proprietors are recognized and established by the existing law of the state as incident to or a part of their property. These rights should not be disregarded. An attempt to do so would be grossly unjust, and could only produce confusion and wrong. Finally, it is a principle of universal application that new laws, and most especially new statutes, should be based upon notions and conceptions with which the people are familiar; they should reflect the customary and popular customs, habits of thought, and institutions.

#### § 164. System of acequias impracticable.

If the foregoing general principles of legislation are accepted and followed, it is plain that the public system of "*acequias*" which prevails in New Mexico and Arizona would be utterly impracticable and impossible in California and Nevada. By that system, it will be remembered, there is not, and cannot be, any private property rights in natural streams and lakes. All such waters are public, free to the use of all occupants of land for the purpose of irrigation. No person can appropriate the water of a stream even for the purpose of milling. The irrigating canals or "*acequias*" are maintained by the public, at the public expense, and are controlled by the local authorities. It is enough to say of this system, which is borrowed from the Spanish-Mexican laws, that it is utterly foreign to the habits of thought, customs, modes of legislation, and institutions of our people; and its adoption would violate all of the established rights of private riparian proprietors as recognized by the existing law of the state. It is hardly probable that any one would seriously advocate the introduction of this type of legislation.

**§ 165. Colorado system criticised.**

It has, however, been strenuously urged that the Colorado system of defining and regulating water rights, which virtually prevails in Montana, Idaho, and other territories, and of which a detailed account was given in a previous chapter, should be adopted by the legislation of California. We do not think that any intelligent lawyer or statesman, or careful student of political economy, who was familiar with the results of legislation, and with the enforcement of statutes creating hostile and conflicting interests, could recommend the adoption of this Colorado system. In order to understand what this legislation really is, the reader must consult the detailed synopsis of the statutes given in a former chapter; it will be sufficient now to state its essential and fundamental notions. It utterly disregards all natural laws and the natural rights arising from the *position* of those who own lands situated directly upon the banks of streams. It places persons owning land at any distance from a stream upon exactly the same footing of right to its water with those who own land upon its very banks. Its fundamental idea is that prior appropriation from any stream by any one, irrespective of his location, or his prior possession or ownership, confers an absolute supremacy of right to use and divert its water; so that a proprietor who has for years owned land on the banks of a stream, but has not constructed a ditch by which to divert and use its water, shall be subordinate to any person who makes a prior actual appropriation for the benefit of his lands, however distant from the stream. It virtually permits an unlimited invasion of private lands, for the purpose of constructing and maintaining ditches across them by which to carry water.

As Colorado and these territories become more fully settled, especially by an agricultural population, this system of water regulation will inevitably give rise to an enormous amount of

trouble, controversy, and litigation. It is impossible to conceive of legislation tending more than this to create strifes, conflicts, and breaches of the peace. The right of prior appropriation on the public streams was a most fruitful cause of litigation in California, as is shown by the great number of reported cases; but this is a feeble illustration of the litigation and controversy which must arise from the statutes of Colorado and of the various territories when they come into full operation upon an increasing population.

**§ 166. Legislation must respect natural laws and natural rights.**

No legislation can be just or practicable, or can tend to the peace and prosperity of society, which attempts to violate and override natural laws and natural rights,—the immutable truths which exist in the regular order of nature. No matter what may be its motive, although enacted for the assumed purpose of benefiting certain classes of society, legislation which disregards natural laws, justice, and rights not only produces evil to society as a whole, but even injures the very classes it was designed to benefit. There is much in the general legislation of California which demonstrates the truth of this principle. A most instructive essay might be written upon this topic, which would conclusively show the injurious results of many California statutes which violate natural laws, and economic truths and rights based upon natural *justice*,—results which bear most heavily upon the very classes whose interests were intended to be promoted. We cannot refrain from illustrating this most momentous principle of economic laws by a single example. The legislation of California, in dealing with the relations of debtor and creditor, leans very strongly in the supposed favor of the debtor class. This leaning is shown in a very remarkable manner in the statute of limitations. There is probably no

other civilized country in the world, except perhaps some states or territories which have copied the California statutes, which prescribes such extremely short periods of limitation within which rights of action are barred. Every lawyer of intelligence is familiar with the analogous statutes in England and in most of the American states, and can make the comparison with our own. These extremely short periods which seem to abridge the creditor's rights, were enacted with the supposition that the debtor class would be benefited thereby. What is the actual effect? There is no other state in the Union where the laws are *practically* so hard against debtors in the enforcement of claims as in California; there is no other state where the debtor's property is so constantly and necessarily sacrificed on judgments and executions.

Under these statutes of limitation, and the decisions construing them, a creditor, however well disposed and however willing to favor his debtor, cannot be lenient, cannot give terms. Any leniency on his part is simply rendered impossible by the statute which would bar and destroy his claim by a brief period of inaction. However worthy, honest, and industrious the debtor may be, or however unfortunate he may have been, his creditor cannot stay his hand except at the risk of entirely losing the demand. The creditor must foreclose his mortgage within the brief statutory period, no matter at how great a loss for the debtor; he must sue and obtain judgment, and must seize and sell the debtor's property on execution, no matter at how great a sacrifice. In other states a creditor can be lenient without risk to himself; he can wait for years, so that an honest, industrious, or unfortunate debtor may recover himself, because his mortgage remains good for twenty years, his judgment continues to be an effective security for ten years, and his debt, whatever may be its form, is not barred within six years. But the legislature of California, acting in the supposed interests of

the debtor class, has made it simply impossible for a creditor to be lenient, and has exposed the debtor to a greater risk of loss and sacrifice of property than results from the laws of any other state, except those, if any, which have copied the California statutes.

This is only a single example, but it well illustrates a principle which is universal. The truth is established, not only by the most convincing *a priori* reasoning, but by general experience, that legislation which disregards natural laws and rights must work injury to society. The various classes of society are so connected that no large class can be injured without injury to all.

### § 167. Natural rights and advantages of riparian owners.

The laws of nature certainly give a natural right and advantage, from their superiority of position, to those who own land lying on the banks of natural streams. It is an undeniable *fact* that such proprietors have a natural right as compared with those who own land at a distance from streams. Legislation which disregards this fact—which attempts to deprive the one class of their natural right and advantage, and to confer the same right and advantage upon the other—is necessarily impracticable; it cannot work successfully; it is essentially unjust, and can only produce wrong. Statutes, however elaborate and detailed, which invade natural rights, and violate the sense of natural justice, must be the occasion of unlimited confusion, strife, contention, and litigation; nothing can be settled and established by them. The common-law doctrines recognize and protect this natural right and advantage of the private riparian proprietor; they regard it as a fact which cannot be denied nor overcome, and they build all of their specific rules upon it as a foundation.

A similar natural advantage is connected with landed ownership in many other respects. Those who own fertile and productive lands have an enormous natural superiority over those proprietors whose lands are wholly situated in barren and unproductive soils and regions. Is this any just ground for legislation which would authorize the latter class to invade the possessions of the former, and to deprive them of some portion of their more valuable property? Those who own land upon which there is a supply of forest trees, have a great natural advantage over those whose lands are entirely devoid of timber. Is this any just ground for statutes enabling the latter to claim and appropriate a portion of the timber land belonging to the former? The use of the stream, and of the water flowing through it, forms a part of the rights incident to and involved in the ownership of the lands upon its borders. This is the principle recognized by the common law, and which should be recognized by any auxiliary legislation. It is, moreover, a natural law, an inevitable fact, which no legislation can change. Any statute denying this fact simply attempts an impossibility.

### § 168. Legislation should recognize these rights.

It results from the foregoing positions that any legislation, in order to be just and practicable, should *primarily* recognize, maintain, and protect the water rights, and especially the right to use the water, for purposes of irrigation, of all the private riparian proprietors owning lands abutting on either bank of any natural stream throughout its entire course.

### § 169. Jurisdiction of equity.

We have no doubt that equity has full jurisdiction over all the private riparian proprietors upon any given stream, to determine their individual rights, and to furnish a perpetual means for the protection and enforcement of those rights. A very re-

markable case, which came within our personal knowledge several years ago, furnishes a most striking illustration of the *principle* which underlies this equitable jurisdiction.<sup>1</sup>

In the early settlement of the city of Rochester, on the Genesee river, in western New York, a gentleman named Brown owned the bed of the Genesee river immediately above the main falls,—a perpendicular fall nearly one hundred feet high within the limits of the city,—and also a strip of land extending from these falls along the west bank of the river for a mile or more. He built a dam across the river a few rods above the falls, and constructed a mill race or canal leading from this dam about a mile down the river, on its west side, parallel to and a few hundred feet from the river bank, which was through this whole length a perpendicular cliff nearly one hundred feet high. One of the finest water-powers in the country was thus obtained and utilized. The space between this mill canal and the west bank of the river he divided into a large number of mill lots, perhaps one hundred in all, varying in width, each abutting at its front end on the mill canal, and at its rear end on the perpendicular bank of the river. These lots, together with the right to draw a certain amount of the water from the mill canal, were from time to time conveyed in fee to different grantees, each grantee covenanting to use only the amount of water specified in his deed of conveyance. In process of time, all the lots had thus been sold and conveyed in fee, and Brown, the original owner, retained no interest whatever in the property. A continuous line of mills and manufactories had been built on these lots along the bank of the river; many of the lots had passed to subsequent grantees; and there were perhaps one hundred dif-

<sup>1</sup>The *principle* is the avoiding a multiplicity of suits by quieting the titles of numerous parties when they all depend upon the same rule

of law and the same questions of facts. See the discussion of this principle in 1 Pom. Eq. §§ 255-275.

ferent proprietors of mill lots, all holding under the original conveyances from Brown. There was, of course, no privity of contract between these various grantees and lot-owners, and since Brown had conveyed each lot in fee, and had retained no reversionary interest whatever, there was no privity of estate among the various grantees and proprietors of different mill lots. When the Genesee river was high, there was an ample supply of water for the needs of all the mills and manufactories. But during a large portion of each year, while the natural flow of the river was lessened, the supply of water through the mill canal was diminished; and in consequence of this the lot-owners on the upper part of the canal diverted and consumed more of the water than the proportionate amounts to which they were entitled. This practice of unlawful consumption was carried on to such an extent that the supply of water was largely cut off from the lots on the lower part of the canal, and a very serious loss was thereby occasioned to their owners. For all this injury there was no adequate remedy at law. In this condition the owner of a mill at the lower end of the canal brought a suit in equity, making all the other proprietors and occupants of mill lots bordering on the canal defendants, and setting out facts showing the titles and water rights of each separate and individual lot, for the purpose of obtaining a decree establishing and quieting the title of each proprietor on the canal to divert and use the waters. Such a decree was rendered. It established the right of each proprietor to use the proportionate amount of water conveyed by his original deed; it definitely fixed these amounts; it determined the number of feet or inches of water which could be drawn from the canal for each lot, and the size of the opening through which the water could flow; and it provided for constructing permanent barriers and gates for each lot, by means of which the amount drawn from the canal for the use of the lot might be controlled and regulated. In order to make the de-



cision final and perpetual, and to secure and protect the rights of all thus determined, the decree provided for the appointment and maintenance of a perpetual commission, representing all the proprietors on the canal, who should possess the power to inspect the water supply-gates and openings of each lot, and to preserve inviolate the water rights and water supply of each lot as they had thus been finally established by the decree of the court.<sup>1</sup>

It is true the stream in this case was an artificial canal; but, as there was no privity of contract nor of estate among all the different lot-owners on the canal, their relations with each other, so far as the jurisdiction of equity is concerned, were virtually the same as those which subsist between the different private riparian proprietors upon any natural stream. The principle is the same in both cases. We have no doubt that on the same principle, in a suit brought by one private riparian proprietor against all the other similar proprietors upon any given stream, a court of equity might establish their rights as among themselves to use the water for irrigation, the amounts which each could divert, and the order, times, and seasons of his diversion, and might appoint a perpetual commission, representing all the proprietors on that stream, which should have power to carry into effect the provisions of the decree.

### § 170. Legislation to the same end.

Granting this to be within the jurisdiction of equity, yet the same end could be more easily, simply, and inexpensively accomplished by appropriate legislation. We have referred to the jurisdiction of equity, not for the purpose of advising a resort to it, but for the purpose of illustrating more plainly the

<sup>1</sup>This case exemplifies in the clearest manner the practically unlimited power of courts of equity to adapt their special remedies to special and new conditions of fact.

exact object sought to be obtained by means of legislation. The legislation should regard all the private riparian proprietors owning lands abutting on either bank of any given natural stream as constituting one individual community for the purpose of irrigation. It should *primarily* assert, secure, and protect the equal rights of all the members of this community to use the waters of that stream for the purpose of irrigation, as rights naturally superior to those held by all other classes of land-owners. It should *declare*, in the clearest manner, the fundamental principle that each riparian proprietor is only entitled to use, for the irrigation of his own land, such portion of the stream as is the excess over and above the portions which all the other riparian proprietors upon the same stream are entitled to use, for the like purpose, on their own lands; and the equally fundamental principle that other persons owning land, *not* situated on the stream, are only entitled to use, for the irrigation of their *non-riparian* lands, such portion of the waters of the stream as remain in excess after the *primary* needs of the riparian proprietors have been *reasonably* satisfied. To protect and enforce the rights thus declared, the legislation should provide for a local officer or commissioner, or *small* board of commissioners, chosen in some manner by the community of riparian proprietors. It should be the duty of this commissioner or board to make and enforce specific rules or by-laws concerning the use of the water for irrigation by the individual members of the community of riparian proprietors, and also to determine the amount of the stream, if any, remaining over and above after the wants of the riparian proprietors had been reasonably supplied, and which could be appropriated, if required, to the irrigation of lands at a distance from the stream. Into the detail of these specific rules or by-laws which should be made by the local commissioners on each stream we shall not attempt to enter. They must necessarily vary with the size and character

of the streams, and should be adapted to all the possible conditions of fact. Such rules could easily be prepared by intelligent members of each riparian community, who were familiar with the stream, and with the modes of husbandry and wants of the whole community residing on its banks.

### § 171. Provision for non-riparian lands.

Thus far our proposed legislation has dealt alone with the rights of the actual riparian proprietor to use the waters of a stream for the irrigation of their riparian lands; and we are now brought to the much more difficult inquiry, how far and how should the legislation provide for the diversion of water from a stream for the purpose of irrigating lands not situated on its banks,—lands belonging to owners who are non-riparian, but which may need the aid of irrigation in order to develop their full capacity for production, or, perhaps, to render them at all productive? In many of the smaller streams throughout the state the natural flow of water is so limited and fluctuating that no diversion could be made to supply the wants of other land-owners without thereby infringing upon the superior rights of their riparian proprietors. This class of small streams must, it seems, be left for the exclusive use of those who possess the natural advantage of owning lands upon their banks. Unless this be so, then it should be carefully observed that there *is not any limit whatever*, depending upon the size of a natural stream, to the right of appropriation held by any third person; any third person would have the same right to interpose and appropriate the waters of a natural brook, which both rises and flows through its entire length within the boundaries of any land, which he has to appropriate the waters of a somewhat larger stream which runs for a few miles through or between the lands of several proprietors. This simple illustration shows the absurdity, as well as the in-

justice, of carrying the doctrine of appropriation to its logical results.

But the larger and permanent rivers of the state, the San Joaquin, and its affluents like the Merced, the Tuolumne, the Calaveras, and others coming down from the heights of the Sierras, and the Sacramento with its similar branches, the Bear, the Yuba, the Feather, and others, when not polluted by hydraulic mining, if reasonably and properly controlled and utilized, can certainly furnish an adequate and constant supply of water, for the purpose of irrigation, to vast communities of land-owners in addition to the riparian proprietors upon their very banks. And irrigation is a matter of such paramount importance to the agricultural interests of California that legislation should add something to the mere common-law doctrines, for the benefit of these non-riparian cultivators of the soil. The problem is, how shall the needs of these communities of land-owners away from the large streams—these *non-riparian* owners—be provided for and satisfied, consistently with the natural advantage and *primary* right of the communities of riparian proprietors? The doctrine of unlimited prior appropriation, which obtains on purely public streams, must, as we have seen, be rejected as both unjust and impracticable in its application to these private streams,—streams bordered by private ownership.

### § 172. Condemnation of stream for public use.

The question first arises whether, as a mode of solving this problem, the legislature should provide some general means by which any community or neighborhood of distant, non-riparian owners may appropriate and take the waters of a convenient stream, through the process of condemnation, under an exercise of the right of eminent domain, upon the payment of a just compensation to the private riparian proprietors on the banks of such stream whose property has been taken and whose pri-

mary rights have been invaded? This method of obtaining the water of a stream by distant land-owners is recognized by the California statute passed in 1874, quoted in a former chapter; but that statute is only local and partial in its application, and it lacks the detail and precision essential to a practical system.

Is the use of water by private land-owners for the irrigation of their lands a "*public use*," within the settled meaning of that term, so that the legislature has power, under the constitution, to authorize the taking of water for such purpose, by the right of eminent domain,—the power to take private property for a public use upon the payment of a just compensation? The fact that a statute declares a certain use to be a public one, and authorizes the taking of private property for it, does not necessarily make the use public, nor render the taking of private property for it valid. It is settled by unanimous agreement of authorities that, *when a use is public*, the decision of the legislature that the public needs require the taking of private property to promote the use is final and conclusive, and cannot be inquired into by the courts. But it is equally well settled by courts of the highest authority that the question whether *a given use is or is not public* is a judicial one, to be determined by the courts. If the mere declaration of the legislature that a certain use is public, and authorized the taking of private property, were final and conclusive, then the constitutional guaranty forbidding the taking of private property except for public use would be rendered wholly nugatory; it would be made a mere empty form of words. For example, if a statute of the state legislature should pronounce a certain manufactory carried on at a certain town to be a public use, and should purport to authorize its owners to take private property for their own purposes, the courts would not be impeded by this legislative declaration, but would hold the statute to be unconstitutional and void. The following points concerning the use of natural waters for various

purposes have been settled by the courts: The supply of water to the inhabitants of a city, village, or town, either by the municipal authorities themselves, as in case of the Croton Water-Works for New York city, or by a corporation, as in case of the Spring Valley Water Company for San Francisco, is clearly established to be a public use. The ground upon which this conclusion was rested is that a water supply to the members of a community is necessary to promote the general health of that community; and there is no higher or more evident public use than the public health. A supply of water for drinking, for washing and bathing, and for all other domestic purposes, and for flushing sewers, and the like, tends to promote the general public health of a city or village as much as a supply of pure air. To furnish an adequate supply for such purposes, the waters of a natural stream or lake may therefore be condemned upon payment of just compensation to those whose private property rights are thereby invaded.<sup>1</sup>

Again, it is settled that the draining of extensive districts of swampy, marshy, or wet lands is a public use, and that private property may be taken for such drainage works, or to defray the expense of their construction and maintenance. This decision has been wholly placed, by the courts, upon the ground of the

<sup>1</sup>[*St. Helena Water Co. v. Forbes*, 62 Cal. 182; *Smith v. Gould*, 59 Wis. 631, s. c. 18 N. W. Rep. 457. A city which has, under statutory authority, acquired riparian property by purchase or condemnation, and erected water-works for the purpose of supplying the inhabitants with water, is, like any other riparian proprietor, entitled to have upper proprietors enjoined from polluting the stream, unless they have acquired a right to do so by prescription, in which case

the city would have to acquire that prescriptive right as it did the other, by purchase or condemnation. *Baltimore v. Warren Manuf'g Co.*, 59 Md. 96. The construction and maintenance of a public canal is a public purpose; and water may be taken for that purpose, although the mill-power of adjacent riparian proprietors is thereby injured or destroyed, compensation being made. *Cooper v. Williams*, 4 Ohio, 253.]

benefit to the general health of the local community resulting from the drainage. The courts have most distinctly held, in passing upon this class of cases, that the benefit done to the individual owners, the enhancement in the value of their farms, the increase in the productions of their lands, and the like, resulting from the system of drainage, do not of themselves make such works a public use; such benefits are nothing but a private use more or less multiplied. The public health alone is what gives the character of a public use to such measures. Again, it is settled by an overwhelming weight of authority in a great majority of the states,—although a different rule prevails in a few states, the effect of local customs,—that the propelling of mills, factories, and manufactories, by water taken from natural streams, is in no sense a public use. It may be regarded, as the result of principle and authority, that anything which merely benefits an individual's own private property; which merely enhances its value, or renders it more productive or more capable of cultivation,—is not a public use. And what is thus essentially a private benefit does not become a “public use,” simply because a large number of individuals may enjoy the same benefit with respect to their own private property. Otherwise, there is not a single trade, business, or profession that is not a “public use” within the provision of the constitution.

### § 173. Whether irrigation is a public use.

Is, therefore, the taking of water from natural streams for the irrigation of the lands of private owners a public use? If water should be thus taken by one person alone to irrigate his own farm, then, under the doctrines derived both from principle and from the authority of decided cases, the use would clearly seem to be private and not public,—as completely private as plowing, sowing, planting, fencing, ditching, and any other

means by which the land is improved, its value enhanced, or its productiveness increased for the personal and immediate benefit of the owner. The conclusion would seem to be equally true, if water is taken in like manner by several separate and detached owners, for the benefit of each individual's land. But suppose there is a community composed of numerous—say 50—different landed proprietors, occupying a certain well-defined tract of land, containing many thousand acres, situated at a distance of several miles from a large stream, and so located topographically that all the farms comprised in the tract could be irrigated by means of one main canal taking water from that stream.

This supposition presents the question in the most favorable light possible, and it certainly and fairly represents the actual condition, with respect to the needs and the facilities for irrigation, in many parts of the state. Would the irrigation of the lands belonging to the members of this community be a public use, so that they would be authorized, for that purpose, to appropriate and condemn the waters of the neighboring stream, against the consent of the private riparian proprietors on such stream? The question is a very difficult one; the answer to it is far from clear. • How does the use of the water by each individual member of such community differ in kind or degree from the use of the water by each riparian proprietor on the stream? How does the use by the whole community differ from the use by the entire mass of riparian proprietors? How is the use by such community any more public than the use by all the riparian proprietors on the stream? By what justice, or under what principle of constitutional law, can such a community, *simply because it occupies a tract of land at a distance from the stream*, deprive the community living on the stream of their natural right to the water, *when the uses by each community are exactly the*



*same?* For it should be remembered that the right to appropriate and condemn the water of a stream by exercise of the right of eminent domain, if it exists at all, is absolutely unlimited as to extent and quantity. If the distant community may condemn any portion of the waters of a stream, against the consent of the riparian proprietors on the stream, then it may condemn and appropriate the entire body of the water, and leave none whatever for the riparian proprietors, upon the payment of sufficient compensation. Again, how should the compensation be assessed and paid in any such case of condemning partially or wholly the waters of a stream? Every riparian proprietor on the stream would be justly entitled to some compensation, for the rights of every one would be invaded. Any fair, reasonable, and just assessment of the damages among all the riparian proprietors would be practically impossible.

These are some of the difficulties which must necessarily attend any scheme for the condemnation of the waters of a natural stream, under the right of eminent domain, for the benefit of communities located at a distance from the stream.

Whatever measures of legislation are adopted, the natural rights of the riparian proprietors on the streams should, as we have already shown, be first protected and their exercise regulated. Only the *excess* of the water remaining unconsumed after *their* needs have been *reasonably* supplied should be appropriated to the use of distant and non-riparian owners. But in such a case there is no necessity for any resort to the right of eminent domain, to the condemnation of water, nor to the payment of compensation. Communities of owners at a distance from the larger streams should be entitled to reach and appropriate this excess of their waters after the wants of the riparian proprietors are reasonably satisfied, without any condemnation or payment of compensation, since such a use would not substantially affect any rights held by the riparian proprietors on the streams.

## § 174. Eminent domain.

[It seems very clear, upon the authorities, that riparian owners have a vested right in the benefits and advantages arising from their adjoining the water, of which they cannot be deprived without compensation.<sup>1</sup> But that, under proper conditions, a water-course may be taken under the power of eminent domain, for the irrigation of the surrounding country, seems to be plainly indicated by the decision in *Lux v. Haggin*,<sup>2</sup> that "the riparian owner's property in the water of a stream may (on payment of due compensation to him) be taken to supply farming neighborhoods with water." "It is apparent," said the court, "that in deciding whether a use was public the legislature was not limited by the mere *number* of persons to be immediately benefited, as opposed to those from whom property is to be taken. It must happen that a public use (as of a particular wagon or railroad) will rarely be directly enjoyed by all the denizens of the state, or of a county or city, and rarely that all within the smallest political subdivision can, as a fact, immediately enjoy every public use. Nor need the enjoyment of a public use be unconditional. A citizen of a municipality to which water has been brought by a person or corporation which, as agent of the government, has exercised the power of eminent domain, can demand water only on payment of the established rate, and on compliance with reasonable rules and regulations. And while the court will hold the use private where it appears that the government or public *cannot* have any interest in it, the legislature, in determining the expediency of declaring a use public, may, no doubt, properly take into the consideration all the advantages to follow from such action; as the advancement

<sup>1</sup> *Bell v. Gough*, 3 Zab. 624; *Trenton Water Co. v. Raff*, 36 N. J. Law, 335; *Munroe v. Ivie*, 2 Utah, 535. See Commissioners of Homo-

*chitto River v. Withers*, 29 Miss. 21.

<sup>2</sup> 69 Cal. 255, 10 Pac. Rep. 697, construing Code Civil Proc. Cal. 1238.

of agriculture, the encouragement of mining and the arts, and the general, though indirect, benefits derived to the people at large from the dedication. \* \* \* The words 'farming neighborhoods' are somewhat indefinite. The idea sought to be conveyed by them is more readily conceived than put into accurate language. Of course, 'farming neighborhood' implies more than one farm; but it would be difficult to say that any certain number is essential to constitute such a neighborhood. The vicinage may be nearer or more distant, reference being had to the populousness or sparseness of population of the surrounding country; but the farmers must be so near to each other—relatively to the surrounding settlers—as to make what in popular parlance is known as a 'farming neighborhood.' A very exact definition of the word is not, however, of paramount importance. The main purpose of the statutes is to provide a mode by which the state, or its agent, may conduct water to arable lands where irrigation is a necessity, on payment of due compensation to those from whom the water is diverted. The same agent of the state may take water to more than one farming neighborhood. It must always be borne in mind that under the Codes no man, or set of men, can take another's property for his own *exclusive* use. Whoever attempts to condemn the private right must be prepared to furnish (to the extent of the water he consumes and pays for) every individual of the community or communities, farming neighborhood, or farming neighborhoods, to which he conducts it, the consumers being required to pay reasonable rates, and being subjected to reasonable regulations; and whether the quantity sought to be condemned is reasonably necessary to supply the public use in a neighborhood or neighborhoods must be determined by the court in which the proceedings are brought for condemnation of the private right."<sup>1</sup>]

<sup>1</sup>Lux v. Haggin, 69 Cal. 255, 10 Water Co. v. Baker, 95 Cal. 268, Pac. Rep. 700. See, also, Aliso 30 Pac. Rep. 537.

### § 175. Summary of suggestions concerning legislation.

Without any further discussion, we shall briefly sum up our conclusions with respect to the character, form, and objects of the legislation which we suggest:

*First.* The resort to the right of eminent domain and the condemnation of water should be restricted mainly, even if not entirely, to the obtaining adequate supplies for consumption by cities, villages, and other municipalities. This being a public use of the highest nature,—the preservation of the general health,—it overrides all other uses, and takes preference of irrigation, manufacturing, mining, watering stock, and all other ordinary purposes to which natural streams may be appropriated. All other uses of water must succumb to this.

*Second.* The smaller streams throughout the state should be left substantially to the exclusive use, so far as irrigation is concerned, of the private riparian proprietors upon their banks. The natural right and advantage of the riparian proprietors entitle them to the first use of the waters of such streams; and, after their primary needs have been reasonably satisfied, there will not be left any substantial excess of the waters for the use of distant and non-riparian land-owners.

*Third.* The larger and permanent streams throughout the state, the names of some of which have already been mentioned, are capable, when properly regulated and utilized, of supplying the needs for irrigation, not only of all the private riparian proprietors on their banks, but also of large communities who occupy lands more or less distant from them. While the riparian proprietors even on these larger streams have a natural advantage, and are entitled to have their wants first supplied for purposes of irrigation, yet they are not entitled to consume the entire waters of a stream. After the reasonable needs of the ri-

riparian proprietors have been fairly and reasonably ascertained and satisfied, all the excess of the waters of any such stream belongs of right, for the purposes of irrigation, to those communities of non-riparian land-owners who are so situated, geographically and topographically, that they can in the best manner appropriate and utilize such surplus of the waters.

*Fourth.* Legislation of the character heretofore described should carry these principles into operation. A single commissioner, representing the community of riparian proprietors on each of the smaller streams, could regulate their use of the water for irrigation by appropriate by-laws. On each of the larger class of streams a local board of commissioners could frame the necessary by-laws for the government of both the riparian proprietors on the stream, and the communities of land-owners occupying tracts at a distance from it. The general powers of these commissioners, and the general nature of the rules or by-laws which they should promulgate, have already been sufficiently indicated. The details of these special rules must largely depend upon particular circumstances connected with each separate stream.

*Fifth.* The title of the Civil Code concerning water rights should be wholly repealed, as being entirely inconsistent with the fundamental principles of the system here proposed. The doctrine of prior appropriation is completely at war with a system which recognizes, harmonizes, and protects the rights of *all* parties in the state.

### § 176. Concluding observations.

I have now completed the design which was formed when this essay concerning "Water Rights" was commenced; in fact, the discussion has extended to a much greater length than I had originally supposed would be necessary. It is true, I have by no means exhausted the general subject of rights connected

with water, of property in water, or in the soil covered by the water, under all conditions and circumstances. There are many important questions which I have left untouched; there are many questions of great doubt and difficulty, peculiar to this Pacific coast, to which I have not even alluded.

The single object of this essay was to ascertain, as far as possible, the law peculiar to the Pacific states and territories, concerning the waters of natural running streams, the rights of all persons, riparian proprietors and others, to use the waters of such streams, and especially, as being of paramount importance to the agricultural interests, their right to use and consume these waters for the purpose of irrigation.

Upon the foundation of existing law, as thus ascertained, it was my further design to suggest such measures of just and practicable legislation as would render the waters of these streams available, for purposes of irrigation, to the largest communities of persons engaged in agriculture, with the least possible interference with the existing and natural rights of any class. The object thus proposed has been reasonably accomplished. There seemed to be a prevailing opinion among the members of the legal profession—an opinion in which I partook when commencing this essay—that the law of California and other Pacific commonwealths concerning the water rights in natural streams, private riparian rights, the rights of private riparian proprietors, and similar topics connected with the appropriation and use of such waters, was wholly vague, unsettled, and uncertain, to be collected only from doubtful, contradictory, and conflicting decisions. It has been shown that there is, in reality, no foundation for this opinion. In the great majority of the states and territories embraced within our review, the entire field has been occupied by elaborate systems of statutory legislation. In California and Nevada it has been shown, as it seems to me, beyond the possibility of question or doubt, that the principles

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and fundamental doctrines of the common law concerning the waters of natural streams flowing through or by private lands, private riparian rights, and the rights of private riparian proprietors, have been established by the courts in an unbroken series of decisions.

There are two antagonistic interests in the state, each endeavoring to control the legislature, and to shape the legislation entirely in its own behalf, to the complete exclusion of the other. These are the riparian proprietors, who assert their common-law rights, and would exclude all other classes from any participation in the waters of the stream, however abundant; and the communities of land-owners away from the banks of streams, who deny any rights of the riparian proprietors, and claim a free, unrestricted access to and appropriation of all natural streams, limited only by the extent of their own needs. The latter class, being the most numerous, has prevailed with the legislature, and shaped the legislation exclusively for its own benefit, in most of the Pacific states and territories, whose statutes I have hereinbefore quoted.

The type of legislation which I have proposed, recognizes the just claims of both these classes; it provides for satisfying the demands of each, so far as possible, without completely sacrificing the other; but it necessarily requires that each should surrender some portion of its exclusive pretensions. I have the utmost confidence that the main elements and features of legislation which I have proposed, might, in the hands of intelligent men, who were familiar alike with the situation and topography of the larger rivers, and of the regions through which they run, and with the agricultural methods, customs, and wants of the adjacent communities, be worked up into a just, practicable, and efficient system for the regulation of irrigation throughout all parts of the state.

## CHAPTER X.

### IRRIGATION AND DITCH COMPANIES.

[By the Editor.]

#### I. LEGISLATION AUTHORIZING AND REGULATING SUCH COMPANIES.

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#### I. LEGISLATION AUTHORIZING AND REGULATING SUCH COMPANIES.

#### § 177. Systems of statutory regulation.

Within the past few years the subject of irrigation has become one of paramount importance in certain of the western and southwestern states. And as this subject developed, it became apparent that additional legislation,



for the protection of the available waters, and for regulating the appropriation and use of streams for this purpose, was a matter of urgent necessity. The states, therefore, addressed themselves to the task of framing statutes which should efficiently meet these requirements, and at the same time make the benefits to be derived from an economical and well-planned system of irrigation available to the greatest possible extent throughout their territories. These statutes have been enacted, for the most part, since the preceding portions of this work were originally written. But it is believed that the propriety of including in the present edition a synopsis of their terms, and a discussion of the judicial decisions in which they have been construed, is too obvious to require an apology.

The statutes to which we refer, though exhibiting a great deal of variety in the detail, will admit of being generally divided into three classes. The system established by the laws of the first class is that of "irrigation companies" or "ditch companies." These are private corporations, authorized by the statute and regulated by it in respect to their powers, duties, and liabilities. Their object is to acquire exclusive rights to the water of certain streams or other sources of supply, and to convey it, by means of ditches or canals, through a region where it can be beneficially used for agricultural purposes. They are invested with the power of eminent domain for the purpose of acquiring the necessary rights of way, and also, in some states but not all, for the purpose of condemning the water rights of appropriators and riparian owners. They may divide the water among stockholders, or make contracts with consumers, or furnish a supply to all who apply at fixed rates. But the legislature usually reserves the right to regulate their charges, and the courts compel them to furnish water to all persons entitled thereto. They are made liable for dam-

ages caused by the operation of their works and by the failure to keep the same in good repair. And on the other hand, their property is protected from injury or interference by severe penal laws.

The system established by the statutes of the second class is that of "irrigation districts." These are public and quasi-municipal corporations, each comprising a defined region or area of land which is susceptible of one mode of irrigation from a common source and by the same system of works. They are organized on petition, hearing, and order of the proper local authorities, and are governed by their own officers, usually a board of directors, assessor, collector, and treasurer. The district has power to acquire, either by purchase or condemnation, all the lands, waters, and water rights needed for its purposes, and to construct the necessary canals and other works. Its indebtedness is to be bonded, and the interest on the bonds—and the principal by successive instalments—is to be paid by annual taxation on the real estate within the district. The water distributed for purposes of irrigation is to be apportioned ratably among the land-owners of the district, to each according to the ratio which his last assessment for district purposes bears to the whole sum assessed upon the district.

The statutes of the third class provide a system of state supervision and control of the appropriation and use of water. They contemplate a division of the state into "water districts," which, however, are not public or municipal corporations. In each of these districts there is a "water commissioner," who, in conjunction with the division superintendents and the state engineer, is charged with the enforcement of the law. The plan of these statutes is not to disturb existing appropriations or water rights, but to secure, by official supervision, the just distribution of the water according to the rights of all who have

claims to its use, and in the most economical manner, and to regulate future appropriations so that the streams shall be made to serve as many claimants as possible, and to avoid conflicting and disputed interests.

These several systems will be considered in this and the succeeding chapters, the present chapter being devoted to the subject of irrigation companies. Many corporations of this character have been chartered in the different states, and particularly in Colorado, and the subject of their rights powers, and duties, is one of great interest and importance, although the statutes are as yet of too recent date to admit of the accumulation of any great body of case-law in reference to their interpretation.

### § 178. Statute of Oregon.

We shall begin our discussion of these statutes with a synopsis of the law in force in Oregon; not because this is the earliest in date of such acts, but because it is the most complete, consistent, and well-ordered. This statute was passed February 18, 1891.<sup>1</sup> Its provisions are as follows:

Sec. 1. "The use of the water of the lakes and running streams of the state of Oregon for general rental, sale, or distribution for purposes of irrigation and supplying water for household and domestic consumption and watering livestock on dry lands of the state, is a public use, and the right to collect rates or compensation for such use of said water is a franchise. A use shall be deemed general, within the purview of this act, when the water appropriated shall be supplied to all persons whose lands lie adjacent to or within reach of the line of the ditch or canal or

<sup>1</sup> Laws of Oregon 1891, p. 52.

flume in which said water is conveyed, without discrimination other than priority of contract, upon payment of charges therefor, as long as there may be water to supply."

Sec. 2. [Powers of corporation.] "A corporation organized for the construction and maintenance of a ditch or canal or flume for general irrigation purposes, and other purposes above prescribed, may appropriate and divert water from its natural bed or channel, and condemn right of way for its ditch or canal or flume, and may condemn the rights of riparian proprietors upon the lake or stream from which such appropriation is made, upon complying with the terms of this act. Such corporation shall also have the right to condemn lands for the sites of reservoirs for storing water for future use, and for rights of way for feeders carrying water to such reservoirs, and for ditches carrying the same away, and distributing ditches, and shall have the right to take from any running stream in this state and store away any water not needed for immediate use by any person having a superior right thereto."

Sec. 3. [Right of entry on lands.] "Such corporation may enter on any land for the purpose of locating a point of diversion of the water intended to be appropriated, and upon any land lying between such point and the lower terminus of its proposed ditch or canal or flume, for the purpose of examining the same and of locating and surveying the line of such ditch or canal or flume, together with the lines of necessary distributing ditches and feeders for reservoirs, and to locate and determine the sites for reservoirs for storing water."

Sec. 4. [Posting notice.] "When a point of diversion shall have been selected, such corporation shall post in a conspicuous place thereat a notice in writing containing a statement of the name of the ditch or canal or flume and of the owner thereof, the point at which its head-gate is pro-

posed to be constructed, a general description of the course of said ditch or canal or flume, the size of the ditch or canal or flume in width and depth, the number of cubic inches of water by miner's measurement under a six-inch pressure intended to be appropriated, and the number of reservoirs, if any."

Sec. 5. [Notice and map to be filed.] Within ten days after posting the notice, a copy of the same must be filed for record, together with a map showing the general route of the ditch. These must be filed in each county wherein any part of the system lies. Within sixty days after the completion of the ditch, a map of its definite location must be filed, as above.

Sec. 6. [Condemning land needed.] "When such corporation shall have acquired the right to appropriate water, in the manner hereinbefore provided, it may proceed to condemn lands and premises necessary for right of way for its ditch or canal or flume, and likewise for its distributing ditches and feeders and for sites for reservoirs." But the amount of land to be so condemned is limited to a strip 100 feet wide for the main ditch, and 30 feet wide for each distributing ditch or feeder, and a prescribed acreage for each reservoir.

Sec. 7. [Compensation.] If the corporation cannot agree with the land-owner as to the amount of compensation, or if the latter is "absent from the state, or incapable of acting," the corporation may bring an action in the appropriate court to have the land appropriated to its use and to determine the amount of damages to be paid.

Sec. 8. [Condemnation of riparian rights.] "Such corporation may also maintain an action for the condemnation and appropriation of the right to the flow of water in any stream from which it proposes to divert water below the point of diversion vested in owners of lands lying contigu-

ous to such stream by virtue of their location. . . . But no person owning lands lying contiguous to any stream shall, without his consent, be deprived of water for household or domestic use, or for the purpose of watering his stock, or of water necessary to irrigate crops growing upon such lands and actually used therefor."

Sec. 9. [Completion of works.] The corporation must begin the actual construction of its ditch, etc., within six months after posting the notice, and prosecute the same to completion, without intermission, except for unavoidable causes. "And the actual capacity of said ditch or canal or flume, when completed, shall determine the extent of the appropriation, anything contained in the notice to the contrary notwithstanding. Upon a compliance with the provisions of this act, the right to the use of the water appropriated shall relate back to the date of posting said notice."

Sec. 10. [Prior appropriations respected.] "All existing appropriations of water made for beneficial purposes," in accordance with federal or state law, or the decisions of the courts or local customs, "shall be respected and upheld to the extent of the amount of water actually appropriated, nor shall any existing mill be deprived of its water-power, however lawfully acquired, without the consent of its owner; and all controversies respecting rights to water under the provisions of this act shall be determined by the date of the appropriations as respectively made thereunder by the parties."

Sec. 11. [Changing place of diversion.] The corporation may change the place of its diversion of water from any natural stream, in cases where the channel shall have been so lowered, cut out, turned aside, or otherwise changed, that the ditch does not receive the proper inflow of water to which it is entitled. For this purpose the corporation may exercise the same rights of condemnation as in case of

the original construction of its ditch. And when, from any cause, the original line of the canal or ditch can no longer be maintained, the corporation may alter its course, and for such purpose may condemn lands for right of way as in case of original construction.

Sec. 12. [Shortest route to be followed.] Whenever the corporation shall find it necessary to construct its ditch "across the improved or occupied lands of another, it shall select the shortest and most direct route practicable, having reference to cost of construction, upon which said ditch . . . can be constructed with uniform or nearly uniform grade."

Sec. 13. [Only one ditch where practicable.] "No tract or parcel of improved or occupied land in this state shall, without the written consent of the owner thereof, be subjected to the burden of two or more ditches or canals or flumes constructed under this act for the purpose of conveying water through said property, when the same object can be feasibly and practically attained by uniting and conveying all the water necessary to be conveyed through such property in one ditch or canal or flume." And any corporation which has constructed its ditch must allow any similar corporation to enlarge the ditch and share in the joint use of it, upon proper compensation made.

Sec. 14. [Channel of stream as part of ditch.] The corporation may make use of natural depressions in the earth, along the line of its ditch, as parts thereof; "and it may conduct the water appropriated by it along the channel of any natural stream, but not so as to raise the water thereof above ordinary high-water mark, and may take the same out again at any point desired without regard to the prior rights of others to water from said stream, but due allowance shall be made for evaporation and scapage." (The last word is evidently a draughtsman's error for "seepage.")

Sec. 15. [Head-gate.] The corporation "shall be required to erect and keep in good repair a head-gate at the head of its ditch or canal or flume, which, together with the necessary embankments, shall be of sufficient height and strength to control the water at all ordinary stages."

Sec. 16. [Liability for damages.] The corporation shall be liable for damages arising from leakage or overflow of water from its ditch, when caused by insufficient strength of the banks or walls or by negligence in its management. But it is not liable for damages "resulting from extraordinary unforeseen action of the elements, or attributed in whole or in part to the wrongful interference of another with said ditch or canal, flume, or reservoir, which may not be known to said corporation for such length of time as would enable it by the exercise of reasonable efforts to remedy the same."

Sec. 17. [Bridging highways.] "Any corporation constructing a ditch or canal or flume, under the provisions of this act, across any public highway or public travelled road, shall put a good substantial bridge not less than fourteen feet in breadth over such ditch or canal or flume where it crosses said highway or road. Travel shall not be suspended by the construction of said ditch, and such bridge shall be completed within three days from the time said highway or road is intersected." If the corporation does not obey this provision, the road supervisor is to construct the bridge and recover the cost in an action against the company.

Sec. 18. [Embankments to be kept in repair.] Any corporation constructing a ditch under this act "shall carefully keep and maintain the embankments and walls thereof, and of any reservoir constructed to be used in conjunction therewith, so as to prevent the water from wasting and from flooding or damaging the premises of others;



and it shall not divert at any time any water for which it has no actual use or demand."

Sec. 19. [Distributing ditches.] "Such corporation may acquire the right of way across lands lying contiguous to its ditch or canal or flume, for distributing ditches, in the manner hereinbefore provided, but it shall not be compelled so to do nor to construct distributing ditches upon any lands for the use of the owners thereof. But when any person shall construct a distributing ditch to the line of right of way for the ditch or canal or flume at any practicable point, and shall tender to such corporation the rates usually charged consumers along the line of said ditch or canal or flume, for any amount of water said corporation may have in its ditch or canal or flume, or may have the right and ability to appropriate above the amount already sold, said corporation shall connect said distributing ditch with its ditch or canal or flume and turn therein the amount of water for which tender is made, and if it shall fail or refuse so to do, it shall be liable to such person for all loss or damage sustained by reason of the failure to procure such water. Such corporation shall not be liable for any loss or damage sustained by any person by reason of the defective construction or careless operation of distributing ditches not by it constructed or operated, and not occasioned in whole or in part by its wrongful or negligent act."

Sec. 20. [Lien on crops.] "Any corporation acting under the provisions of this act which shall supply water to any person for the irrigation of crops shall have a lien upon all crops raised by the use of such water for the reasonable value of the water supplied, which lien shall be a continuing one and shall bind such crops after as well as before the same have been gathered, and without record shall be preferred to all other liens or incumbrances upon said

crops whatever. Such liens may be enforced by a suit in equity."

Sec. 21. [Ditches are real estate.] "All ditches or canals and flumes, permanently affixed to the soil, constructed under the provisions of this act, are hereby declared to be real estate, and the same or any interest therein shall be transferred by deed only, duly witnessed and acknowledged. The vendee of the same, or any interest therein, at any stage shall succeed to all the rights of his vendor and shall be subject to the same liabilities during his ownership."

Sec. 22. [Rights lost by abandonment.] "The right to appropriate water hereby granted may be lost by abandonment; and if any corporation constructing a ditch or canal or flume under the provisions of this act shall fail or neglect to use the same for the period of one year at any time, it shall be taken and deemed to have abandoned its appropriation, and the water appropriated shall revert to the public and be subject to other appropriations in order of priority. But the question of abandonment shall be one of fact to be tried and determined as other questions of fact."

Sec. 23. [Penalty for injury to ditches.] Heavy penalties are provided against any person who shall "cut, dig, break down, or open any gate, bank, embankment, or side of any ditch, canal, flume, feeder, or reservoir," with malicious intent to injure the owner, or with intent to let out the water and steal the same. The person so trespassing shall also be liable in damages.

Sec 24. [Parties to actions.] In any suit brought for the protection of water rights acquired under this act, all persons who have diverted water from the same stream or source may be joined as defendants. And any person claiming a right on said stream or source, and interested

in the result of the suit, may come in as a party; and the court may require any other necessary parties to be brought in.

Sec. 25. [Right of way over state lands.] "The right of way, to the extent hereinbefore specified, for the ditches or canals, flumes, distributing ditches and feeders, of any corporation appropriating water under the provisions of this act, across any and all lands belonging to the state of Oregon and not under contract of sale, is hereby granted."

Sec. 26. [Legislative control.] "This act may at any time be amended by the legislative assembly, and commissioners for the management of water rights and the use of water may be appointed, and rates for the use of water may be fixed by the legislative assembly or by such commissioners; but such rates shall not be fixed lower than will allow the net profits of any ditch or canal or flume or system thereof to equal the prevailing legal rate of interest on the amount of money actually paid in and employed in the construction and operation of said ditch or canal or flume or system thereof."

Sec. 27. "Inasmuch as the question of conflicting claims to the appropriation and use of the water of the streams and lakes of this state, for irrigation purposes and other purposes hereinbefore enumerated, is a vexed one and should be speedily settled, this act shall take effect and be in force from and after its approval by the Governor."

### § 179. Statute of California.

In the state of California, a statute was passed in the year 1885, having special reference to the sale, rental, and distribution of water for beneficial purposes.<sup>2</sup> Its provisions are as follows:—

Sec. 1. "The use of all water now appropriated, or that

<sup>2</sup>Act of Mar. 12, 1885; St. Cal. 1885, p. 95.

may hereafter be appropriated, for irrigation, sale, rental, or distribution, is a public use, and the right to collect rates or compensation for use of such water is a franchise, and except when so furnished to any city, city and county, or town, or the inhabitants thereof, shall be regulated and controlled in the counties of this state by the several boards of supervisors thereof, in the manner prescribed in this act."

Secs. 2-7. These sections provide for the fixing of maximum rates by the several boards of supervisors, upon the petition of not less than twenty-five tax payers of the county. The hearing of the petition is to be had after publication and notice. The statute intends that the rates shall be fixed at such a figure as will allow to the corporation a net annual profit of not less than six per cent., nor more than eighteen per cent., on the cost of its investment or value of its plant. The supervisors may establish different rates for the sale, the rent, and the distribution of water, and different rates for the several different uses for which the water may be furnished, but the rates, as to each class, shall be equal and uniform. The tariff of rates so fixed shall remain in force for at least one year, unless sooner changed or abrogated. But it may be changed, on petition as above, or on petition of the company. The tariff of rates shall be recorded and published.

Sec. 8. "Any and all persons, companies, associations, or corporations, furnishing for sale, rental, or distribution, any appropriated waters to the inhabitants of any county or counties of this state (other than to the inhabitants of any city, city and county, or town therein) shall so sell, rent, or distribute such waters at rates not exceeding the established rates fixed and regulated therefor by the boards of supervisors of such counties, or as fixed and

established by such person, company, association, or corporation, as provided in this act."

Sec. 9. If excessive rates are charged, the person aggrieved has an action for the recovery of the whole rate so collected, together with his actual damages, and costs.

Sec. 10. "Every person, company, association, and corporation, having in any county in the state (other than in any city, city and county, or town therein) appropriated waters for sale, rental, or distribution, to the inhabitants of such county, upon demand therefor, and tender in money of such established water rates, shall be obliged to sell, rent, or distribute such water to such inhabitants at the established rates regulated and fixed therefor, as in this act provided, whether so fixed by the board of supervisors or otherwise, to the extent of the actual supply of such appropriated waters of such person, company, association, or corporation, for such purposes. If any person, company, association, or corporation, having water for such use, shall refuse compliance with such demand, or shall neglect, for the period of five days after such demand, to comply therewith to the extent of his or its reasonable ability to do so, [he or it] shall be liable in damages to the extent of the actual injury sustained by the person or party making such demand and tender, to be recovered, with costs."

Sec. 11. Whenever such person or corporation shall have acquired the right to appropriate water in this state, he or it may proceed to condemn the lands and premises necessary for the right of way, under the general provisions of the statutes relating to the condemnation and taking of property for public use.

Besides the foregoing statute, we find certain provisions of the Civil Code of California which are applicable to the subject in hand. These are as follows:—

Sec. 551. "Every water or canal corporation must construct and keep in good repair, at all times, for public use, across their canal, flume, or water-pipe, all of the bridges that the board of supervisors of the county in which such canal is situated may require, the bridges being on the lines of public highways and necessary for public uses in connection with such highways; and all water-works must be so laid and constructed as not to obstruct public highways."

Sec. 552. "Whenever any corporation, organized under the laws of this state, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates and terms as may be established by said corporation in pursuance of law. And whenever any person who is cultivating land on the line and within the flow of any ditch owned by such corporation, has been furnished water by it with which to irrigate his land, such person shall be entitled to the continued use of said water, upon the same terms as those who have purchased their land of the corporation."

### § 180. Statute of Washington.

The laws of this state, on the subject of irrigation and water rights, are at present involved in much confusion and uncertainty, in consequence of the attempt to incorporate in one code widely different systems of regulation in force in various other states. It may be seen, however, that a part of the plan of the legislators was to include a system of rules for the organization and government of irrigation companies. This system is in many respects similar to that in force in Oregon, to which, no doubt, it furnished numerous suggestions. We here give a synopsis of those provisions of the statutes which relate

to such companies, changing the order of the sections somewhat, for the purpose of a more logical arrangement.<sup>3</sup>

Sec. 1718. [Surplus waters may be appropriated.] "Any person is entitled to take from any of the natural streams or lakes in this state water for the purposes of irrigation, not heretofore appropriated or subject to rights existing at the time of the adoption of the constitution of this state, subject to the conditions and regulations imposed by law; provided, that the use of water at all times shall be deemed a public use, and subject to condemnation as may from time to time be provided for by the legislature of this state."

Sec. 1772. [Corporations may construct ditches.] "Any corporation duly organized under the laws of this state for the purpose of constructing ditches or canals to carry water for irrigating purposes, or any person or persons, or association or firm, may construct irrigating canals, ditches, or flume-ways for the purposes of carrying water from any natural stream, reservoir, or any lake within this state, and may condemn the right of way therefor, . . . for the purpose of furnishing water to persons upon the line of said ditch, or its lateral branches, to irrigate the lands of any person or persons, whether the same be on any natural stream or lake, or whether or not said corporation, association, person, or firm owns any land upon the line of said ditch or its laterals."

Sec. 1773. [Such corporations public carriers.] "Such corporation, person, association, or firm shall be deemed to be a public carrier, and shall at all times be subject to the regulations prescribed for said ditch by the legislature from time to time."

Sec. 1774. [Condemnation extends only to riparian rights.]

<sup>3</sup>The references are to 1 1782. The act was passed March. Hill's Ann. St. Wash. §§ 1718- 4, 1890.

"The right herein given to condemn the use of water shall not extend any further than to the riparian rights of persons to the natural flow of water through lands upon or abutting said streams or lakes, as the same exist at common law, and is not intended in any manner to allow water to be taken from any person that is used by said person himself for irrigation, or that is needed for that purpose by any such person."

Sec. 1730. A natural stream may be used as part of a ditch or water-course, and the water reclaimed, allowance being made for evaporation and seepage. (This is substantially the same as § 14 of the Oregon act, as quoted above.)

Sec. 1734. [Division of water when supply is insufficient.] "If at any time any ditch from which water is or shall be drawn for irrigation shall not be entitled to the full supply of water from the natural stream or lake which supplies the same, the water actually received into and carried by such ditch shall be divided among all the consumers of water from said ditch, as well as the owners, share-holders and stockholders thereof, as the parties purchasing water therefrom, and the parties taking water, partly under and by virtue of holding shares and partly by purchasing the same, shall each receive his share pro rata, according to the amount he (in cases in which several consume water jointly) shall then be entitled to, so that owners and purchasers shall not suffer from a deficiency rising from the cause aforesaid, each in proportion to the amount of water which he should have received in case no such deficiency of water had occurred." <sup>4</sup>

Secs. 1737 and 1755. The embankments of the ditch

<sup>4</sup> We give the exact wording of this obscure and exceedingly ill-expressed section. It was copied from a statute of Colorado. See, *infra*, p. 372, and note, p. 373.



must be kept in good repair. (The provision is similar to § 18 of the Oregon act, quoted above.) And further, the owner is required to "make a tail ditch so as to return the water in such ditch with as little waste as possible into the stream or lake from which it was taken."

Sec. 1738. The ditch-owner must bridge crossings of public highways. (Similar to § 17 of the Oregon act, except that the bridge is to be sixteen feet wide.)

Sec. 1739. [Amount of water to be taken.] During the irrigating season it shall not be lawful for the ditch-owners to run through their ditches any greater quantity of water than is absolutely necessary for irrigating the lands supplied. Violation of this section is a misdemeanor.

Sec. 1740. [Head-gate.] The owner of any irrigating ditch must erect and keep in repair a good and sufficient head-gate. (Same as § 15 of the Oregon act.)

Sec. 1751. [Condemning right of way.] "All persons, associations, and corporations entitled to the use of water under the provisions of this chapter, in cases where the right of way over intervening lands is necessary to the use of such water, may condemn the right of way for any such ditch or ditches as hereinafter provided."

Secs. 1752-1754. These sections provide a system of rules for such condemnation of rights of way, by proceedings in the superior court and the fixing of the amount of compensation by appraisers.

Sec. 1756. Not more than one ditch, where practicable, to be put through any improved or occupied land. (The same as the first part of § 13 of the Oregon act.)

Sec. 1757. The ditch is to follow the shortest practicable route. (Substantially the same as § 12 of the Oregon act.)

Sec. 1758. In what cases head of ditch, or point of di-

version, may be changed. (The same as § 11 of the Oregon act.)

Sec. 1759. [Map to be filed.] This section makes provision for the filing of a complete and detailed map of the route of the ditch, within ninety days after its construction or enlargement.

Sec. 1760. [Applies only to irrigating ditches; abandonment of rights.] "This chapter shall apply to and affect only ditches or canals used for carrying water for the purpose of irrigation and for no other purpose whatever; provided, that all rights shall be forfeited under the provisions of this chapter unless due diligence is used in such construction or enlargement."

Sec. 1761. [Condemnation of riparian rights.] "Any person, association, or corporation desiring to condemn the riparian rights of persons in any natural stream or lake in this state, may do so as follows: Such person, firm, or corporation shall file his, their, or its petition in the superior court of the county wherein said stream or lake or any part thereof is situated, from which said person, association, or corporation desires to take such water, setting forth the uses that the said person, association, or corporation intends to make of said water, the amount of water desired to be taken, and the extent of time that said water is intended to be used."

Secs. 1762-1771. These sections contain an elaborate and detailed system for the proceedings to be taken upon the petition just mentioned.

Sec. 1775. This section prescribes penalties for injuries to ditches. Its terms are very similar to those of § 23 of the Oregon act.

### § 181. Statutes in Wyoming.

The statutes of this state also embrace provisions regulating the organization and government of irrigation and ditch companies, similar to those in Oregon and Washington. It is not considered necessary here to present a synopsis of these provisions, as enough has been said in the preceding sections to indicate the general character of laws of this kind. The laws in question will be found in the Revised Statutes of this state.<sup>5</sup> A supplementary act gives to such companies authority to issue bonds and to execute mortgages and deeds of trust on their property and franchises.<sup>6</sup> And it should be noted that an act of 1890 restricts the rights of such companies to the taking of water not already appropriated, and requires them first to make application to the "Board of Control."<sup>7</sup> This board constitutes a very important feature of the Wyoming legislation on water rights, which will be fully described in a subsequent chapter.<sup>8</sup>

### § 182. Statutes in Colorado.

The laws of this state contain one of the most complete and detailed systems for the regulation of irrigation companies. And as these regulations were adopted, in part, as early as 1868, they must be regarded as constituting the original system, from which those in force in the other states were copied or imitated with greater or less closeness. The provisions in question are found in various parts of the first volume of Mill's Annotated Statutes of Colorado; and those of an important and general nature may be summarized as follows:—

<sup>5</sup> Rev. St. Wyom. 1887, §§ 532-537, 548, 1325-1330, 1343-1361.

<sup>6</sup> Laws Wyom. 1890, p. 365.

<sup>7</sup> Laws Wyom. 1890-91, p. 91.

<sup>8</sup> See, *infra*, § 210.

Sec. 567. This section provides for the incorporation of any three or more persons who may desire to form a company "for the purpose of constructing a ditch for the purpose of conveying water to any mines, mills, or lands, to be used for mining, milling, or irrigating of lands." Their certificate shall specify the stream or streams from which the water is to be taken, the point or place on said stream at or near which the water is to be taken out, the line of the ditch, as near as may be, and the use to which the water is intended to be applied.

Sec. 568. [Right of way.] "Any ditch company formed under the provisions of this act shall have the right of way over the line named in the certificate; and shall also have the right to run the water of the stream or streams named in the certificate through their ditch. Provided, that the line proposed shall not interfere with any other ditch whose rights are prior to those acquired under this act and by virtue of said certificate, except the right to cross by flume; nor shall the water of any stream be diverted from its original channel to the detriment of any person or persons who may have priority of right."

Sec. 569. Contains provisions for assessments on stockholders.

Sec. 570. [When compelled to furnish water.] The company "shall furnish water to the class of persons using the water in the way named in the certificate, in the way the water is designated to be used, whether miners, mill-men, farmers, or for domestic use, whenever they shall have water in their ditch unsold; and shall at all times give the preference to the use of the water in said ditch to the class named in the certificate." Water-rates shall be fixed by the county commissioners.

Sec. 571. The company is required to keep its ditch in good repair, so that the water may not escape therefrom

to the injury of any mining claim, road, ditch, or other property.

Sec. 572. Provision is herein made for the consolidation of ditch companies.

Sec. 573. The company must commence its works within ninety days, prosecute the same diligently to completion, and finish the same within three years, on pain of forfeiting its rights.

Sec. 574. A penalty is imposed upon any person who shall "wilfully or maliciously damage or interfere with" the ditch or other property of the company.

Secs. 949-956. These sections embody the provisions of an act of 1874, authorizing counties to subscribe to the stock of such companies. Arapahoe county is expressly excepted.

The following provisions of the statutes are applicable alike to private persons and corporations owning and constructing ditches. They are given here as being necessary to exhibit the complete system of rules for the government of such companies.

Sec. 2261. [Only one ditch where practicable.] "No tract or parcel of improved or occupied land in this state shall, without the written consent of the owner thereof, be subjected to the burden of two or more irrigating ditches, constructed for the purpose of conveying water through said property to lands adjoining or beyond the same, when the same object can feasibly and practicably be attained by uniting and conveying all the water necessary to be conveyed through such property in one ditch."

Sec. 2262. [Shortest route to be followed.] "Whenever any person or persons find it necessary to convey water, for the purpose of irrigation, through the improved or occupied lands of another, he or they shall select for the line of such ditch through such property the shortest and most

direct route practicable upon which said ditch can be constructed with uniform or nearly uniform grade, and discharge the water at a point where it can be conveyed to and used upon the land or lands of the person or persons constructing such ditch."

Sec. 2263. [Enlarging existing ditch.] "No person or persons having constructed a private ditch for the purposes and in the manner hereinbefore provided, shall prohibit or prevent any other person or persons from enlarging or using any ditch by him or them constructed, in common with him or them, upon payment to him or them of a reasonable proportion of the cost of construction of said ditch."<sup>9</sup>

Sec. 2264. The head of the ditch may in certain cases be extended further up the stream. (This is substantially the same as § 11 of the Oregon act, quoted above.)

Sec. 2265. [Maps and statements.] The ditch-owner is required to file a map showing the point of diversion, the line of the ditch, and of all laterals or feeders, the legal subdivisions through which it passes, the names of property owners along the line, etc., together with specifications of the depth, width, and grade of the ditch, its carrying capacity, and the time of commencing work.

Sec. 2266. The two foregoing sections apply only to such ditches as are used for irrigating purposes exclusively.

Sec. 2267. [Water divided among consumers pro rata.] "If at any time any ditch or reservoir from which water is or shall be drawn for irrigation shall not be entitled to a full supply of water from the natural stream which sup-

<sup>9</sup> These three sections are found in an act of Feb. 12, 1881 (Sess. Laws, p. 164; 1 Mill's St. § 2261 et seq.). They have been substantially copied into the

statutes of Oregon (§ 178, *supra*, secs. 12 and 13) and Washington (1 Hill's St. of Wash. §§. 1756, 1757).

plies the same, the water actually received into and carried by such ditch, or held in such reservoir, shall be divided among all the consumers of water from such ditch or reservoir, as well as the owners, shareholders, or stockholders thereof, as the parties purchasing water therefrom, and parties taking water partly under and by virtue of holding shares, and partly by purchasing the same, to each his share pro rata according to the amount he, she, or they (in cases in which several consume water jointly) shall be entitled to, so that all owners and purchasers shall suffer from the deficiency arising from the cause aforesaid, each in proportion to the amount of water which he, she, or they should have received in case no such deficiency of water had occurred.”<sup>10</sup>

Sec. 2269. [Waste or spring waters.] “All ditches now constructed or hereafter to be constructed for the purpose of utilizing the waste, seepage, or spring waters of the state, shall be governed by the same laws relating to priority of right as those ditches constructed for the purpose of utilizing the waters of running streams. Provided, that the person upon whose lands the seepage or spring waters first arise shall have the prior right to such waters if capable of being used upon his lands.”

Sec. 2270. [Reservoirs.] “Persons desirous to construct and maintain reservoirs, for the purpose of storing water, shall have the right to take from any of the natural streams of the state and store away any unappropriated water not needed for immediate use for domestic or irrigating purposes; to construct and maintain ditches for carrying such water to and from such reservoir, and to

<sup>10</sup> This provision was copied into the statutes of Washington, but, by certain omissions and errors of transcription, was rendered almost unintelligible. See, *supra*, p. 366, and note.

condemn lands for such reservoirs and ditches in the same manner provided by law for the condemnation of land for right of way for ditches. Provided, no reservoir with embankments or a dam exceeding ten feet in height shall be made without first submitting the plans thereof to the county commissioners of the county in which it is situated and obtaining their approval of such plans."

Sec. 2271. Ditch-owners may conduct the water through the channel of a natural stream and afterwards reclaim it. This applies also to the owners of reservoirs, and is substantially the same as the latter half of § 14 of the Oregon act, quoted above.

Sec. 2272. [Owners of reservoirs liable for damages.] "The owners of the reservoir shall be liable for all damages arising from leakage or overflow of the waters therefrom or by floods caused by breaking of the embankments of such reservoirs."

Sec. 2274. [Maintaining embankments; tail ditch.] "The owner or owners of any ditch for irrigation or other purposes shall carefully maintain the embankments thereof, so that the waters of such ditch may not flood or damage the premises of others, and shall make a tail ditch, so as to return the water in such ditch with as little waste as possible into the stream from which it was taken."

Secs. 2276 and 2277. These sections require the owner to bridge the ditch at all points where it crosses the line of public highways or roads. The provision is substantially the same as that in § 17 of the Oregon act.

Secs. 2278-2281. Provisions are herein made requiring the owner to flume or cover his ditch where it passes through a city, and lattice or slat the head thereof. Penalties are prescribed for neglect of this requirement.

Sec. 2282. [Waste to be prevented.] "The owner of any



irrigating or mill ditch shall carefully maintain and keep the embankments thereof in good repair, and prevent the water from wasting."

Sec. 2283. [Running excess of water forbidden.] "During the summer season it shall not be lawful for any person or persons to run through his or their irrigating ditch any greater quantity of water than is absolutely necessary for irrigating his or their said land, and for domestic and stock purposes; it being the intent and meaning of this section to prevent the wasting and useless discharge and running away of water."

Sec. 2285. The ditch-owner must maintain a good and sufficient head-gate. (The same as § 15 of the Oregon act.)

Sec. 2286. Owners neglecting or refusing to comply with the foregoing section are liable for all damages resulting therefrom.

Sec. 2287. [When water shall be kept flowing in ditch.] Between April 15 and November 1, the owners of the ditch shall keep a flow of water therein, as far as may be reasonably practicable, for the purpose of irrigation, sufficient for the requirements of all persons entitled to take water from the ditch. But if the source of supply is inadequate, then the ditch is to be kept as full as practicable.

Sec. 2288. [Ditch to be kept in repair; outlets.] The ditch is to be kept in good repair, and ready to receive water by April 15, so far as can be accomplished by reasonable care and diligence. And the owners "shall construct the necessary outlets in the banks of the canal or ditch for a proper delivery of the water to persons having paid up shares, or who have rights to the use of water." But a multiplicity of outlets is to be avoided, and the owners have a discretion as to their location.

Sec. 2289. The superintendent of the company shall

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measure the water from the canal or ditch through the outlets, to those entitled thereto, according to their pro rata shares.

Sec. 2290. Wilful refusal or neglect to deliver water to those entitled is made a misdemeanor.

Secs. 2295-2309. [Water-rates.] These sections embody the terms of the acts of Feb. 19, 1879, and Apr. 4, 1887, which provided an elaborate system for the jurisdiction and proceedings of the county commissioners in the exercise of their statutory power to regulate and fix the rates of charges for water. The proceeding provided for is in the nature of a judicial investigation and hearing of the facts. These acts also provide penalties for charging illegal or excessive rates, and for the wrongful refusal to deliver water.

Sec. 2395. This section prescribes penalties for injuries to ditches. It is substantially similar in its terms to § 23 of the Oregon act.

### § 183. Statutes in North Dakota and Montana.

The territorial laws of Dakota (now in force in the state of North Dakota) provide a system of rules for irrigation companies substantially similar to that found in Colorado and elsewhere.<sup>11</sup> We give the more important provisions, as follows:—

Sec. 3116. The articles of incorporation of such a company shall describe the stream, the point of diversion, the line of the ditch, and the use to which the water is to be put.

Sec. 3117. The company shall have the right of way over the line described, and the right to run the water of the stream named through its ditch. Provided, that the line proposed shall not interfere with any other ditch

<sup>11</sup> Comp. Laws Dak. § 3116 et seq.

having prior rights. "Nor shall the water of any stream be diverted from its natural channel to the detriment of any miners, mill-men, or others along the line of said stream, who may have a priority of right; and there shall be at all times left sufficient water in said stream for the use of miners and agriculturists along said stream."

Sec. 3118. The company is obliged to furnish water to persons entitled. (This is substantially the same as § 570 of the Colorado act, quoted above, except the provision as to the regulation of rates by the county authorities.)

Sec. 3119. The company must keep the banks of the ditch in good repair, so that water may not escape to the injury of others.

Sec. 3123. The company must begin the construction of its works within ninety days, and prosecute the same diligently to completion, and finish within two years, under penalty of forfeiting the route claimed.

Sec. 6880. "It shall be unlawful for any person or persons to divert any of the waters from any irrigation ditch in this territory, or to interfere in any manner whatever with any irrigation ditch, without first having obtained the permission of the owner of such ditch, or of the person or persons lawfully in charge thereof."

Sec. 6881. The violation of the preceding section is declared a misdemeanor.

The statutes of Montana also contain provisions for the organization and regulation of irrigation and ditch companies, which resemble, in all the important particulars, those in force in Colorado. It is not deemed necessary to summarize them here, but the reader is referred to the volume of statutes where they may be found at large.<sup>12</sup>

<sup>12</sup> Comp. St. Mont. 1887, §§ 446-495.

Mention should also be made of a recent act regulating the proceedings to secure a right of way for a ditch or canal.<sup>13</sup>

#### § 184. Statute of Nebraska.

In Nebraska, we find a statute relating to irrigation companies, which does not differ materially from those already quoted from other states. It gives to such companies a right of way over state lands, and provides for condemning a right of way over private lands. Irrigating canals are declared to be "works of internal improvement," and subject to all laws applicable to such works. Owners of ditches are required to keep them in good repair. The vested rights of prior appropriators are saved. Provisions are made as to the method of distributing the water in times of scarcity and as to the persons entitled thereto. Penalties are prescribed for injuries to ditches.<sup>14</sup>

#### § 185. Statute of Texas.

In this state, the statute provides for the organization and government of corporations formed for the purpose of constructing and operating irrigating canals and ditches, conducting and furnishing water, building storage reservoirs, etc. Right of way, "not to exceed 100 feet in width," is granted to such companies over any and all public lands of the state, and it is provided that they may obtain the right of way over private lands by contract or by condemnation. The act also regulates the sale of the water and indicates the persons who shall be entitled thereto, and provides that the legislature, either directly or by delegating power to a commissioner or inspector,

<sup>13</sup> Laws Mont. 1891, p. 295.

<sup>14</sup> Comp. St. Neb. 1891, c. 93a, p. 847.

may control and regulate the time, manner, and quantity of the diversion of water by such companies, and regulate the rates charged. Such companies are further required to make bridges where their line crosses a road or highway. It is made a misdemeanor for any person to injure the canal or its appurtenances, wilfully or through gross negligence, or to waste the water, or take the water therefrom without authority.<sup>15</sup>

### § 186. Statute of New Mexico.

The statute of New Mexico relating to irrigation companies provides that "any five persons who may desire to form a company for the purpose of constructing and maintaining reservoirs and canals, or ditches and pipe-lines, for the purpose of supplying water for the purpose of irrigation, mining, manufacturing, domestic, and other public uses," may become incorporated. Their articles shall set forth, among other things, "the beginning point and terminus of the main line of such canals and ditches and pipe-lines, and the general course, direction, and length thereof." "If any corporation formed under this act shall not organize and commence the transaction of its business within one year from the time of filing its articles of incorporation, its corporate powers shall cease."

The corporation shall have the following powers and rights:—

1. To enter upon the lands or waters of any person, or of the territory, for the purpose of making examinations and surveys for the line of their proposed canals.
2. To take and hold realty voluntarily granted to them.
3. To construct their canals or ditches upon or along any stream of water.

<sup>15</sup> Sayles' Addendum to Ann. St. Texas, tit. 55, "Irrigation," art. 3000a, §§ 10-16.

4. "To take and divert from any stream, lake, or spring the surplus water, for the purpose of supplying the same to persons to be used for the objects mentioned in section first of this act; but such corporations shall have no right to interfere with the rights of, or appropriate the property of, any person, except upon the payment of the assessed value thereof, to be ascertained as in this act provided; and provided, that no water shall be diverted if it will interfere with the reasonable requirements of any person or persons using or requiring the same, when so diverted."

5. To furnish water for the purposes mentioned at such rates as the by-laws may prescribe. "But equal rates shall be conceded to each class of consumers."

6. "To enter upon and condemn and appropriate any lands, timber, stone, gravel, or other material that may be necessary for the uses and purposes of said companies."

Provision is then made for ascertaining, by appraisement, the compensation to be paid for "any such land, water, timber, stone, gravel, or other material" condemned and taken by the company.

It is also provided that such corporation shall be authorized to construct branch, lateral, or side canals or ditches, to the extent that may be necessary; and for this purpose, the same rights, in regard to condemnation of land and other property, are conferred as have been already mentioned.

The territory grants to such companies a right of way over any and all of its lands, and the right to use any timber, stone, or other materials upon such lands needed for the construction of their works.

The corporation is to construct suitable bridges wherever its line crosses any public highway or street.

Finally it is provided that "no incorporation of any

company or companies to supply water for the purposes of irrigation and other purposes shall have any right to divert the usual and natural flow of water of any stream which, by the law of 1854,<sup>16</sup> has been declared a public acequia for any use whatever, between the 15th day of February and the 15th day of October of each year, unless it be with the unanimous consent of all and every person holding agricultural and cultivated lands under such stream or public acequia, and to be irrigated by the water furnished by said stream or public acequia, and that no incorporation of any company or companies shall interfere with the water rights of any individual or company acquired prior to the passage of this act.”<sup>17</sup>

### § 187. Statute of South Dakota.

In this state we find a recent act “to encourage the construction of artesian wells.”<sup>18</sup>

It authorizes the formation of corporations for this purpose, and provides regulations for their government, powers, rights, and liabilities; creating a system very similar to that provided for the irrigation and ditch companies in other states. It may be summarized as follows:—

Sec. 1. “It shall be lawful for any person or persons, corporation or corporations, company or companies, to construct artesian wells upon any lands owned or leased by such person, company, or corporation, for the purpose of power and the irrigation of lands for agricultural pur-

<sup>16</sup> This must mean the law of Jan. 7, 1852, which declared that “all rivers and streams of water in this territory formerly known as public ditches (acequias), are hereby established and declared to be public ditches (acequias).” I have not

been able to find any law of 1854 on this subject.

<sup>17</sup> Act of Feb. 24, 1887; Laws New Mex. 1886-87, p. 29.

<sup>18</sup> Act of Mar. 8, 1890; Sess. Laws S. Dak. 1890, c. 103, p. 245.

poses, and for any and all purposes for which said water from such wells may be utilized."

Sec. 2. They shall have the right of entry on private lands for the purpose of examining and surveying the proposed line of their ditch.

Secs. 3 and 4. Improved or occupied lands shall not be crossed by more than one ditch where one can be made to serve the purpose, and in locating the ditch through such land the shortest and most direct practicable route shall be chosen. These provisions are the same as those in force in Colorado, and may be seen quoted in full in § 182, above.

Sec. 5. "For the purpose of disposing of the surplus water from an artesian well, it shall be lawful for the said person, company, or corporation to construct the necessary waterways from said well on the routes as provided in sections 2 and 4 of this act."

Sec. 6. Where the ditch or waterway is taken through private land, the company shall pay to the owner the "actual damages which he or they may have sustained by reason of said waterway or ditch to be constructed through his or their lands."

Secs. 7 and 8. These sections prescribe the method of ascertaining the amount of damages to be paid.

Sec. 9. When it is necessary that any such waterway should cross the right of way of a railroad, the railroad company, "when notified by the owner of said well so to do," shall "make and maintain a suitable culvert."

Sec. 10. All such waterways constructed within the limits of or across any public highways are under the jurisdiction of the overseer of highways, and it shall be his duty to keep the same open and free from all obstruction.

Sec. 11. Penalties are prescribed for interfering with

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or injuring any head-gates, water-boxes, pipes, etc. Such injuries are declared misdemeanors.

Sec. 12. A penalty is prescribed for cutting or breaking down the ditch or its banks, and stealing water. (This is the same as in Oregon and Colorado.)

Sec. 13. A plat of the route is to be filed.

Sec. 14. The owners must keep all ditches and waterways in good repair.

Sec. 15. Any injuries to such ditches caused by the acts of a third person, or by his animals or stock, shall be repaired by him at his own expense.

Sec. 16. The owner of land traversed by the ditch has the right to designate the places (not more than one to every 40 rods of said waterways) where bridges or crossings shall be constructed, and these must be built and maintained by the proprietor of the well.

Sec. 18. When the waterway crosses the lands of a person other than the owner of the well, such person may apply to such owner for the right to use the surplus water flowing in the ditch to irrigate his own lands, and such owner shall allow him to so use such water on payment of a just rental. The rates to be paid, and the terms and conditions under which the right may be exercised, shall be fixed by the county commissioners, with an appeal to the circuit court.

Sec. 19. "Whenever waterways or ditches are located or constructed along any public highway, the water which may be flowing therein shall be for the use of the public."

### § 188. Act of congress granting right of way.

In addition to the foregoing legislation of the several states on the subject of irrigation companies, the attention of the reader should be directed to a recent act of congress, granting to such companies a right of way over

the public lands and reservations.<sup>19</sup> Its terms are as follows:—

Sec. 18. "The right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation, and duly organized under the laws of any state or territory, which shall have filed, or may hereafter file, with the Secretary of the Interior, a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch. Provided, that no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation, and all maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation. And the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective states or territories."

Sec. 19. "Any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said

<sup>19</sup> Act of Mar. 3, 1891, §§ 18-21; 26 U. S. St. at Large, 1095; 1 Supp. to Rev. St. U. S., p. 946.

office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

Sec. 20. "The provisions of this act shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or associations of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the register of the land office where said land is located, a map of the line of such ditch, canal, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it. Provided, that if any section of said canal or ditch shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal or ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture."

Sec. 21. "Nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch."

## II. CONSTRUCTION AND APPLICATION OF THESE STATUTES.

## § 189. Acquisition of water rights.

The first question that arises, in the construction of the foregoing statutory provisions, is in relation to the method in which an irrigation or ditch company, organized thereunder, may acquire the water rights which are necessary for its operations. It will be perceived that, in some of the states, such corporations are invested with the power of eminent domain for the purpose of condemning and taking the rights of appropriators and riparian owners. In others, they are given the right to divert and use any "surplus" or "unappropriated" waters. In others, the statutes are silent on this point, leaving it to be governed by existing general laws. There are therefore four possible means by which the company can procure the desired rights in the streams or lakes. These are (1) legislative grant, (2) appropriation, (3) purchase, (4) condemnation.

In regard to the first method, it is to be observed that the legislature could not confer upon such a corporation powers which would enable it to destroy the vested rights of individuals without compensation. It would be beyond the legislative authority, for example, to enact laws that would permit an irrigation company to control or manage the waters of a given portion of the state, in disregard of the rights of individual claimants.<sup>20</sup> And if it grants to such a company "the free use of the waters and streams of the state," this will be understood as applying only to streams upon the public lands of the state.<sup>21</sup> And if the charter authorizes the company to acquire the privilege of using the water of a designated stream for purposes of

<sup>20</sup> *Monroe v. Ivie*, 2 Utah, 535.      *ian*, 74 Tex. 170, 11 S. W. Rep.

<sup>21</sup> *Mud Creek Irr. Co. v. Viv-* 1078.

irrigation, this does not, ipso facto, confer any rights to the use of the water; but such rights must still be acquired, by purchase or condemnation, from the riparian proprietors.<sup>22</sup>

If the company proceeds to secure its water-supply by making an appropriation of water not subject to any prior rights, it will be governed, in all particulars, by the same rules which are applicable to private persons appropriating streams for their own use, as explained in the earlier chapters of this work. The company cannot, for instance, by any provision of its by-laws, rules, or regulations, exempt itself or its stockholders from the operation of the laws in respect to priority of appropriation.<sup>23</sup> So in Colorado, where the constitution provides that the unappropriated water of natural streams shall be public property, and subject to appropriation for the "use of the people" free of charge, it is held that a company distributing water to consumers for hire, not being the proprietor of water not appropriated by it, cannot demand payment in advance for "the right to receive and use water" from its canal.<sup>24</sup> But on the other hand, the users of water from the canal, having themselves made no appropriation of water from a natural stream, and having asserted no right to water prior to the appropriation by the canal company, have no rights, as members of "the public," paramount to those of the company.<sup>25</sup> Where the right of appropriation is locally restricted, the company must be ready to show that its operations are within the territorial limits. Thus, in Texas, the statute provides that the un-

<sup>22</sup> Id.

<sup>23</sup> *Combs v. Agricultural Ditch Co.*, (Colo.) 28 Pac. Rep. 966.

<sup>24</sup> *Wheeler v. Northern Colo.*

*Irr. Co.*, 10 Colo. 582, 17 Pac. Rep. 487.

<sup>25</sup> *Wyatt v. Larimer & Weld Irr. Co.*, 1 Colo. App. 480, 29 Pac. Rep. 906.

appropriated water of any river or natural stream within the arid portions of the state, "in which, by reason of the insufficient rainfall, irrigation is necessary for agricultural purposes," may be diverted from its natural channel for irrigation. An action having been brought against an irrigation company to enjoin it from proceeding with the construction of a dam across a river, it was held that the defendant must plead and prove that the river was in an arid portion of the state, where the rainfall was insufficient and irrigation was necessary; and as it failed to do this, a restraining order was properly granted.<sup>26</sup>

In regard to the acquisition of water rights by purchase from prior holders, nothing special need here be said. The method of transferring such rights has already been commented on.<sup>27</sup> It should be observed, however, that a company does not, by the mere purchase of land on which the head-spring of a stream is situated, acquire the right to divert the water of the spring or stream from its natural channel, without making compensation to lower owners; for its purchase of the land gives it merely the rights of a riparian owner.<sup>28</sup>

That it is within the constitutional power of the legislature to invest an irrigation company with the power of eminent domain, authorizing it to condemn and take the water rights of riparian owners or prior appropriators, in cases where the system of irrigation established by its canals will be of general benefit to an entire community or district, and where it is required to furnish water to all persons who apply for it and offer the proper charges, and where the rates charged are subject to state or municipi-

<sup>26</sup> McGhee Irrigating Ditch Co. v. Hudson, (Tex.) 21 S. W. Rep. 175.

<sup>28</sup> Lord v. Meadville Water Co., 135 Pa. St. 122, 19 Atl. Rep. 1007.

<sup>27</sup> Supra, §§ 60-62.

pal regulation, does not seem to be open to reasonable doubt.<sup>29</sup> This has not often been deemed advisable. But in Oregon the courts have sustained the constitutionality of a statute conferring upon such companies the power thus to appropriate the rights of riparian owners, but with a saving of the rights of such owners in water for household and domestic use, for watering stock, and such as is "necessary to irrigate crops growing upon such lands and actually used therefor."<sup>30</sup>

### § 190. Right to use ditch constructed by another.

In Colorado and Oregon,<sup>31</sup> the statutes provide that no improved or occupied land shall, without the owner's written consent, be subjected to the burden of two or more irrigating ditches, constructed for the purpose of conveying water through such property to lands adjoining or beyond it, when all the water necessary can be conveyed in one ditch; and that no person, having constructed a private ditch for such purposes and in such manner, shall prevent any other person from enlarging or using it, in common with him, on payment of a reasonable proportion of the cost of construction of the ditch. It is held, however, that where a person has constructed a ditch on his own land, for irrigating it, and not with a view to conveying water through or beyond it, this statute gives no authority to another to enlarge the ditch, without the owner's consent, for the purpose of conveying water to the land of others, where there are other practicable routes, and especially where the ditch is not of a uniform grade, and

<sup>29</sup> See §§ 172-174, *supra*. And see *Lux v. Haggin*, 69 Cal. 255, 10 Pac. Rep. 674.

<sup>30</sup> *Umatilla Irr. Co. v. Barnhart*, (Oreg.) 30 Pac. Rep. 37.

See, *supra*, § 178, section 8 of the act.

<sup>31</sup> 1 Mills' St. Colo. §§ 2261-2263; *Laws Oreg.* 1891, p. 52, §§ 12, 13.

its enlargement would greatly diminish its usefulness.<sup>32</sup> But the mere fact that a ditch, sought to be used by other persons than the owners, is owned by a corporation, does not exempt the ditch from the operation of the statute.<sup>33</sup> In the same case in which this decision was made, it was also held that while the court may authorize the applicant to occupy, enlarge, improve, and use the ditch in common with the original owner, it cannot require such owner to perform work or make expenditures for the purpose of

<sup>32</sup> *Downing v. More*, 12 Colo. 316, 20 Pac. Rep. 766. In this case Hayt, J., observed: "That this is the proper construction to be given to the act of 1881 we have no doubt. It was never intended to have any application to cases like the one at bar. Here the ditch sought to be enlarged is a small one, constructed by the respondent for the irrigation of his farming lands, and not for the purpose of running water through said lands to lands adjoining or beyond the same. The statute, in express terms, limits its application to ditches constructed for the purpose of conveying water through such property, and speaks of such ditches as a burden. The ditch of respondent is not a burden to his land, but an improvement upon the same. Under the statute, two or more outside parties cannot burden the servient estate with two or more ditches and two or more easements, without the owner's consent, when it is practicable to accomplish the same object by imposing but one burden. If there was no other practicable or feasible route for the ditch, perhaps the courts might compel the respondent to allow

the enlargement of his ditch by the appellees; but this would not be by virtue of this statute, but would arise from the necessities of the case. In the case at bar, no such necessity is shown to exist, but on the contrary it is shown that water had been taken through this same quarter-section to and upon the lands of one of the appellees by another and different route used by him for several years, upon the verbal consent of the respondent, and that such a route would be practicable for the purpose of conveying water to the lands of both More and Howlett. It further appears that the small ditch sought to be enlarged was not constructed upon any uniform grade, but that it had an average grade of 68 feet to the mile, and that by increasing its capacity as proposed by the appellees the velocity of the water would be accelerated to such an extent as to cause the ditch to wash into the soil, and destroy in a large measure the usefulness of the ditch to the appellant."

<sup>33</sup> *Sand Creek Lateral Irr. Co. v. Davis*, (Colo.) 29 Pac. Rep. 742.



adapting the ditch to such applicant's use. And it was further held in the case cited, that, in ascertaining the amount to be awarded as compensation, the jury should determine and specify the value of petitioner's interest in defendant's right of way, which is a property right with a money value. It is also held in a late case (*San Luis Land Co. v. Kenilworth Canal Co.* [Colo.], 32 Pac. Rep. 860), that this statute is intended only for the benefit of the owner of the land to be crossed, and that it does not apply to a canal company which is seeking to prevent the taking of land for, and the construction of, another irrigating canal by a different company, through the same land occupied by the former company. Also, that the fact that a contemplated irrigating canal runs parallel for many miles with a like canal already constructed, is no reason for prohibiting the former from taking, by right of eminent domain, the necessary land for its use.

### § 191. Bridging highways and crossings.

It will be seen from our synopsis of the statutes, given above, that many of the states require ditch companies to build and maintain suitable bridges over their ditch wherever the same crosses the line of a highway or public travelled road. If such a company neglects to comply with this requirement, it is provided, in several states, that the road supervisors or overseers of highways may construct the necessary bridge or bridges and recover the cost from the company. But where no such alternative provision is made, it is thought that mandamus is a proper remedy to compel the company to fulfill its duty in this respect.<sup>34</sup> But in Colorado it is held that a municipal corporation which accepts the dedication of streets across which a ditch has been previously located and the right of way therefor acquired, takes the same subject to the prior rights of the owners of the ditch; and when the necessi-

<sup>34</sup>*Fresno Co. v. Fowler Switch Canal Co.*, 68 Cal. 359, 9 Pac. Rep. 309.

ties of the public require that such ditch be bridged at the street crossings, it is the duty of the city, and not the ditch-owners, to construct the bridges.<sup>35</sup>

### § 192. Tolls and charges for water.

The power to charge tolls or rates for water sold or distributed to consumers is a franchise, which is conferred on corporations formed under general laws for the organization of irrigation and ditch companies, and it can be exercised by a corporation only in the manner provided for in those laws.<sup>36</sup> Furthermore, it will appear from a review of the statutes that the states, in almost every instance, have reserved the power to control and regulate the amount of such charges. Such a reservation, in view of the important interests affected by such corporations, and in view of the frequent opportunities they would otherwise have of almost unlimited extortion and oppression, as well as in view of the valuable rights and franchises conceded to them, must be regarded as eminently just and reasonable.

### § 193. Contracts with consumers.

A provision in an option contract with a ditch company to furnish a consumer with water, that, upon failure to pay the annual rental, the consumer "forfeits and relinquishes all rights and claims whatsoever in and to the use of said water from said ditch," applies only to rights given by the contract, and does not waive the consumer's statutory right to obtain water from the company's ditch under an order from the county commissioners.<sup>37</sup> On the other

<sup>35</sup> *City of Denver v. Mullen*, 7 Colo. 345, 3 Pac. Rep. 693. As to irrigating canals along the streets of a city, and the circumstances under which they may amount to nuisances, see *City of Fresno v. Fresno Canal Co.* (Cal.), 32 Pac. Rep. 943.

<sup>36</sup> *Spring Valley Water Works v. Bryant*, 52 Cal. 132.

<sup>37</sup> *South Boulder Ditch Co. v. Marfell*, 15 Colo. 302, 25 Pac. Rep. 504. See a contract for water construed in *Rockwell v. Highland Ditch Co.*, 1 Colo. App. 396, 29 Pac. Rep. 285.

hand, a provision in such a contract, that if the company shall wilfully fail or refuse to supply the land-owner with the quantity of water agreed upon, the latter shall have the right, on payment or tender therefor, to take the water, is void, because incompatible with the right of control incident to the ownership of the ditch, and against public policy as tending to confusion and a breach of the peace.<sup>38</sup>

### § 194. Duty of company to furnish water.

In order to make the benefits of the irrigation system established by a corporation of this character available to the greatest number of users of water, the statutes commonly provide that the company shall be required to furnish water to all persons making proper application therefor and tendering the proper charges, so long as it has any water to dispose of. "Under the constitution and laws of this state," says the court in Colorado, "a ditch company carrying water for general purposes of irrigation cannot arbitrarily refuse to supply water to an actual and bona fide consumer, making seasonable application and offering proper compensation therefor. A refusal to supply water, by the carrier, to be justifiable, must rest upon something more substantial than the mere will of the carrier. The constitutional rule that 'priority of appropriation shall give the better right as between those using the water for the same purpose' must never be overlooked, though a variety of circumstances and conditions may have to be taken into consideration in determining the claim of an applicant for water in a given case."<sup>39</sup> In the case of *Golden Canal Co. v. Bright*,<sup>40</sup> the same court had under consideration the statute relating to such companies, with special reference to the relative rights of ditch-owners and the purchasers of water from them. And it was held

<sup>38</sup> *Farmers' High-Line Canal Co. v. White*, (Colo.) 31 Pac. Rep. 345.

<sup>39</sup> *Combs v. Agricultural Lch Co.*, (Colo.) 28 Pac. Rep. 966.

<sup>40</sup> 8 Colo. 144, 6 Pac. Rep. 142.

that, under the law, although the prior purchaser has not made his application within the time prescribed by rule, yet if he does so afterwards, and while the ditch-owner is free from conflicting obligations, and is able to grant his request, the statutory right is not forfeited. Also that the presumption is that the legislature intended to confer the privilege specified in the act, unlimited by any qualification as to the applicant's ability to procure water from any other source. And generally that the owner of an irrigation ditch, under the statute, is bound, provided he has water sufficient for the purpose, to admit a prior purchaser to its use and enjoyment, upon his payment or tender of the proper price therefor, provided the right there-to has not been forfeited.

In California, it is held that water appropriated for distribution and sale is ipso facto devoted to a public use, and a person who conforms to the requirements of the person so appropriating, and offers to pay the fixed rate for the water, is entitled to the aid of the courts to enforce his right to be supplied.<sup>41</sup>

### § 195. Compelling company to deliver water.

When a ditch company unlawfully refuses to furnish water to a bona fide consumer, who makes due application therefor, complies with its reasonable requirements, and tenders the proper charges, the company having water which it could furnish to him without impairing any rights of others, the authorities all agree that mandamus is a proper remedy to compel the company to fulfill its duty in this respect.<sup>42</sup> And the right of the applicant to obtain this writ is not prejudiced by the fact that he has

<sup>41</sup> McCrary v. Beaudry, 67 Cal. 120, 7 Pac. Rep. 264.

<sup>42</sup> Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 Pac. Rep. 487; South Boulder Ditch Co. v. Marfell, 15 Colo. 302, 25

Pac. Rep. 504; Combs v. Agricultural Ditch Co., (Colo.) 28 Pac. Rep. 966; McCrary v. Beaudry, 67 Cal. 120, 7 Pac. Rep. 264.

prospectively a remedy by an action for damages in case his crops fail as the result of lack of irrigation.<sup>43</sup> But it is an imperative rule that before making an application for a writ of mandamus, an express demand or request must be made on the defendant to perform the act sought to be enforced by the writ, and the demand should be definite and specific.<sup>44</sup> Further, this is not an appropriate remedy to compel a ditch company perpetually to furnish a person with water for the purpose of irrigation. "The right of the petitioner to water from the defendant's ditch for the irrigation of his land could, at most, be only an annually recurring right, dependent, among other things, upon an annual tender of the price."<sup>45</sup> And if the complainant does not show a contract or prescriptive right to receive from the defendant company the number of inches of water which he claims, the most that he can lawfully claim is an adequate supply for the irrigation of his land. And it will be proper for the court to determine from the evidence what is such an adequate supply and to require the company, by its writ, to furnish that amount to the complainant and no more.<sup>46</sup>

### § 196. Rights of stockholders.

Where a stockholder in a ditch company has acquired a right to a certain amount of water, he may change the point of diversion of such water from one ranch to another, notwithstanding a long user on the former, unless the rights of others are injuriously affected, or unless his right to so divert it is restricted by some valid by-law of the

<sup>43</sup> Golden Canal Co. v. Bright, Ditch Co., (Colo.) 29 Pac. Rep. 8 Colo. 144, 6 Pac. Rep. 142. 453.

<sup>44</sup> Price v. Riverside Land Co., <sup>45</sup> Bright v. Farmers' High-Line Canal Co., (Colo.) 32 Pac. 56 Cal. 431. Rep. 433.

<sup>46</sup> Townsend v. Fulton Irr.

company, or agreement; and a by-law impairing such a right would have no effect, unless authorized by the charter of the company, or assented to by the stockholder whose right is affected.<sup>47</sup> But irrigation rights acquired by an owner of land, and represented by stock in a ditch company, do not become inseparably annexed to the land in connection with which they are acquired and used; and if the owner disposes of the stock in the company, he or those to whom he afterwards conveys the land have no further claim to such rights of irrigation.<sup>48</sup>

**§ 197. Duty to keep ditch in repair; liability for injuries.**

The statutes, as we have seen above, require irrigation and ditch companies to keep their canals and other works in good repair, so that the water may not escape therefrom or otherwise injure the property of others. In regard to the degree of care required, we find an instructive case in California, from the opinion in which we quote as follows: "The injury complained of occurred in a season of high water caused by the melting of the snow on the mountains above. The overflow so caused is periodical, and may be and is anticipated by all persons inhabiting the region where the alleged damage occurred. The obligation rested on defendant to keep the banks of its canal in repair. It was bound to use ordinary diligence for this purpose. The diligence required, however, must be commensurate with the duty, and the duty is that ordinarily employed by a prudent business man when dealing with his own affairs under the circumstances which surround him and call his mind and energy into action. If

<sup>47</sup> Knowles v. Clear Creek Ditch Co., (Colo.) 32 Pac. Rep. 279.

<sup>48</sup> Oppenlander v. Left Hand Ditch Co., (Colo.) 31 Pac. Rep. 854.

the accumulation of sand in the defendant's ditch was such as to render it probable that the periodical overflow would by its action wash out the sand and thus damage the land of plaintiff, it was then the duty of the defendant to use all the means which an ordinarily prudent business man would employ under the circumstances to prevent it. The sand might have been removed from the ditch and deposited where the water would not reach it during the period of overflow referred to above. Ordinary prudence would have dictated such a course to prevent injury to the property of another. As before stated, the obligation rested upon defendant to exercise the diligence in the use and management of its ditch which a prudent man would ordinarily employ under the circumstances where his own interests were to be affected."<sup>49</sup>

In a case in Colorado, it appeared that defendants permitted the water to overflow the banks of their ditch, and flood the plaintiff's land, though they had been warned that the ditch was running too full, and that the water was in danger of escaping unless the flow was diminished. After this warning, the superintendent, at the request of one of the trustees of the company, raised the head-gates and increased the flow. It was held that defendants were liable under the statute, and that they could not avoid the consequence of their own negligence on the plea that gophers burrowed the banks, and that therefore the overflow was the result of unavoidable accident.<sup>50</sup> In another case, where defendant permitted a break in his ditch to remain unrepaired for three weeks, whereby plaintiff's land was overflowed, it was held that such conduct was

<sup>49</sup> *Chidester v. Consolidated Ditch Co.*, 59 Cal. 197. And <sup>50</sup> *Greeley Irr. Co. v. House*, 14 Colo. 549, 24 Pac. Rep. 329. see, *supra*, §§ 78, 79.

negligence per se, and defendant was liable.<sup>51</sup> Again, a person owning a ditch, from which water escapes upon the premises of an adjoining land-owner, cannot escape liability on the ground that such land-owner might, at a small expense, have prevented any damage by digging a ditch on his own land that would have carried off the waste water.<sup>52</sup>

### § 198. Liability for failure of water supply.

Where the certificate of incorporation of a ditch company stated that the company was formed for maintaining a water ditch, keeping it in repair, and dividing the water between the several stockholders, it was held that the company was liable thereunder for injuries to a stockholder caused by the acts of other stockholders in diverting more water to their use than they were entitled to under the terms of incorporation.<sup>53</sup> But the liability of an irrigation company for failing to supply a certain volume of water to the holders of water rights, according to contract, cannot be determined on the theory that the company is a common carrier, where the rights in question were acquired from the company after its appropriation of the water in its canal from a public stream.<sup>54</sup>

<sup>51</sup> Catlin Land & Canal Co. v. Ditch Co., 17 Nev. 245, 30 Pac. Best, (Colo.) 31 Pac. Rep. 391. Rep. 882.

<sup>52</sup> McCarty v. Boise City Canal Co., (Idaho,) 10 Pac. Rep. 623.

<sup>53</sup> O'Connor v. North Truckee

<sup>54</sup> Wyatt v. Larimer & Weld Irr. Co., 1 Colo. App. 480, 29 Pac. Rep. 906.



## CHAPTER XI.

## IRRIGATION DISTRICTS.

[By the Editor.]

- § 199. Statute of California; the "Wright Act."  
 200. Statutes of Washington and Nevada.  
 201. Statute of South Dakota.  
 202. Statute of Utah.  
 203. Constitutionality of these statutes.  
 204. Irrigation districts are public, but not municipal, corporations.  
 205. Organization of district.  
 206. Including and excluding territory.  
 207. Levy of assessments.  
 208. Proceedings for confirmation of bonds.

## § 199. Statute of California; the "Wright Act."

Statutes authorizing the formation of public corporations called "irrigation districts" have recently been adopted in several of the Pacific states. Of these statutes, the most complete and detailed is that in force in California, and it has constituted the model for the corresponding legislation of several other states. For these reasons we shall here present a full synopsis of its terms. This act (familiarily called the "Wright Act") was passed in 1887,<sup>1</sup> and, during the four succeeding years, was amended and supplemented in various particulars by numerous additional acts.<sup>2</sup> These amendments we have incorporated in

<sup>1</sup> Act of Mar. 7, 1887; St. Cal. 1887, p. 29.

<sup>2</sup> The successive amendments and supplements to the Wright act were made by the following laws:

Act of Feb. 16, 1889; St. Cal. 1889, p. 15.

Act of Feb. 16, 1889; St. Cal. 1889, p. 18.

Act of Feb. 16, 1889; St. Cal. 1889, p. 21.

Act of Mar. 16, 1889; St. Cal. 1889, p. 212.

Act of Mar. 10, 1891; St. Cal. 1891, p. 53.

Act of Mar. 20, 1891; St. Cal. 1891, p. 142.

Act of Mar. 20, 1891; St. Cal. 1891, p. 147.

Act of Mar. 31, 1891; St. Cal. 1891, p. 244.

the body of the statute, so as to exhibit the present state of the law.

Sec. 1. [Proposal for organization.] "Whenever fifty, or a majority, of the holders of title, or evidence of title, to lands susceptible of one mode of irrigation from a common source and by the same system of works, desire to provide for the irrigation of the same, they may propose the organization of an irrigation district, under the provisions of this act, and when so organized, said district shall have the powers conferred, or that may hereafter be conferred by law, upon such irrigation districts." [As amended by Act of Mar. 20, 1891; St. Cal. 1891, p. 142.]

Sec. 2. [Petition; bond; boundaries of district; notice of election.] A petition is to be presented to the board of supervisors of the county which contains the lands in question, or the greatest part thereof, signed by the requisite number of persons, and particularly describing the boundaries of the proposed district, and praying for its organization under the act. The petition is to be accompanied by a bond in a sum equal to double the amount of the probable cost of organizing the district, conditioned for the payment of all costs in case the organization is not effected. The petition is to be presented at a regular meeting of the board, and must be published for at least two weeks before the time at which the same is to be presented. The board are to hear the petition, "and on the final hearing may make such changes in the proposed boundaries as they may find to be proper, and shall establish and define such boundaries; provided, that said board shall not modify such boundaries so as to except from the operation of this act any territory within the boundaries of the district proposed by said petitioners which is susceptible of irrigation by the same system of works applicable to the other lands in such proposed district; nor shall any lands which will not, in

the judgment of said board, be benefited by irrigation by said system be included within said district; provided, that any person whose lands are susceptible of irrigation from the same source may, in the discretion of the board, upon application of the owner to said board, have such lands included in such district." The district is to be divided into five divisions, as nearly equal in size as may be practicable, and one director shall be elected from each of the divisions. The board of supervisors shall then give notice of an election to be held in the proposed district for the purpose of determining whether or not the same shall be organized. This notice is to be published for at least three weeks in a newspaper published in the county. [As amended, St. Cal. 1891, p. 142. As to change of boundaries, see amendatory act of Feb. 16, 1889; St. Cal. 1889, p. 18, also p. 21.]

Sec. 3. [Election.] This section provides for the holding of the election just mentioned, and the canvass of the votes by the board of supervisors. If two-thirds of all the votes cast are in favor of the district, the board shall declare it duly organized. The order so declaring shall be recorded in each county wherein any portion of the lands lie. [As amended, St. Cal. 1891, p. 142.]

Sec. 4. [Officers.] An election shall be held in each district, biennially, to choose an assessor, collector, treasurer, and a board of directors. These officers are to take and subscribe an official oath and file bonds. The bond of the assessor is to be in the sum of \$5,000; that of the collector, \$20,000; that of the treasurer, \$50,000; that of each of the directors, \$5,000. [As amended, St. Cal. 1891, p. 142.]

Secs. 5-10. [District elections.] These sections relate to the holding of elections in the district after its organization. They provide for the posting of election notices by the board of directors; the appointment of a board of

election, and the powers and duties of its chairman; the time of voting; the counting of the votes; the manner of certifying the returns; the disposition of the election returns; the canvassing of the returns; the declaring and recording the result; and the issue of certificates of election. [See amendatory act of Feb. 16, 1889; St. Cal. 1889, p. 15.]

Sec. 11. [Powers of board of directors.] Provision is made for the meeting and organization of the board of directors. "The board shall have the power, and it shall be their duty, to manage and conduct the business and affairs of the district; make and execute all necessary contracts; employ and appoint such agents, officers, and employes as may be required, and prescribe their duties; establish equitable by-laws, rules, and regulations for the distribution and use of water among the owners of said lands; and generally to perform all such acts as shall be necessary to fully carry out the purposes of this act. The said by-laws, rules, and regulations must be printed in convenient form for distribution in the district. And it is hereby expressly provided that all waters distributed for irrigation purposes shall be apportioned ratably to each land-owner upon the basis of the ratio which the last assessment of such owner for district purposes within said district bears to the whole sum assessed upon the district; provided, that any land-owner may assign the right to the whole or any portion of the waters so apportioned to him." [As amended, St. Cal. 1891, p. 142.]

Sec. 12. [Acquisition of lands and water rights.] Provision is made for regular monthly meetings of the board of directors, and for special meetings on call. Three members constitute a quorum. "The board and its agents and employes shall have the right to enter upon any land to make surveys, and may locate the necessary irrigation

works and the line for any canal or canals, and the necessary branches for the same, on any lands which may be deemed best for such location. Said board shall also have the right to acquire, either by purchase or condemnation or other legal means, all lands, and waters and water rights, and other property, necessary for the construction, use, supply, maintenance, repair, and improvement of said canal or canals and works, including canals and works constructed and being constructed by private owners, lands for reservoirs for the storage of needful waters, and all necessary appurtenances. In case of purchase, the bonds of the district hereinafter provided for may be used at their par value in payment; and in case of condemnation, the board shall proceed, in the name of the district, under the provisions of title 7 of part 3 of the Code of Civil Procedure. Said board may also construct the necessary dams, reservoirs, and works for the collection of water for said district, and do any and every lawful act necessary to be done that sufficient water may be furnished to each land-owner in said district for irrigation purposes. The use of all water required for the irrigation of the lands of any district formed under the provisions of this act, together with the rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of this act, is hereby declared to be a public use, subject to the regulation and control of the state, in the manner prescribed by law." [As amended, St. Cal. 1891, p. 142.]

Sec. 13. [Title to property.] "The legal title to all property acquired under the provisions of this act shall immediately and by operation of law vest in such irrigation district, and shall be held by such district in trust for, and is hereby dedicated and set apart to, the uses and purposes set forth in this act, and the said board is hereby author-

ized and empowered to hold, use, acquire, manage, occupy, and possess said property as herein provided.”

Sec. 14. The board is authorized to take conveyances of property, and to institute and maintain necessary proceedings at law and in equity.

Sec. 15. [Bonds of district.] The board of directors are to estimate the amount of money necessary to be raised for the purpose of constructing the irrigating canals and other works, and for acquiring the necessary property and rights therefor, and shall call a special election, at which the qualified electors of the district are to vote on the question whether or not the bonds of the district in the amount as determined shall be issued. Notice of the election is to be given,<sup>3</sup> and the election is to be held as nearly as practicable in conformity with the provisions already given for the elections for officers, but it is not to be invalidated by any mere informality in conducting it. If the result is in the affirmative, the board shall cause the bonds to be issued. These bonds shall be payable in gold, and shall be divided into ten series, so arranged that the first shall be paid off in eleven years, and the last at the end of twenty years. They are to bear six per cent. interest payable semi-annually. The bonds are to be in denominations of not less than \$100 nor more than \$500, and be negotiable in form. [As amended, St. Cal. 1891, p. 147.]

Sec. 16. [Sale of bonds.] “The board may sell said bonds from time to time, in such quantities as may be necessary and most advantageous, to raise money for the construction of said canals and works, the acquisition of said prop-

<sup>3</sup> As this section provides the manner of giving notices for special elections for voting bonds for irrigation districts, it excludes the notice provided by section 5 of the act, which

provides for general elections for that purpose. Board of Directors of Modesto Irrigation District v. Tregea, 88 Cal. 334, 26 Pac. Rep. 237.

erty and rights, and otherwise to fully carry out the objects and purposes of this act." The board shall give notice of their intention to sell bonds, and receive sealed proposals for the purchase of the same. [Note. The act of Mar. 16, 1889, St. Cal. 1889, p. 212, supplemental to this statute, provides for judicial proceedings for the examination, approval, and confirmation of proceedings for the issue and sale of such bonds. See, *infra*, § 208.]

Sec. 17. [Payment of bonds.] "Said bonds and the interest thereon shall be paid by revenue derived from an annual assessment upon the real property of the district; and all the real property in the district shall be and remain liable to be assessed for such payments as hereinafter provided."

Sec. 18. [Assessment of realty.] This section provides for an annual assessment of the realty in the district by the district assessor, and for the form and contents of the assessment; and the descriptions and other information to be entered in the assessment book; also for the assessment of property which may have escaped assessment the previous year. [As amended, St. Cal. 1891, p. 244.]

Secs. 19-21. These sections regulate the appointment and compensation of deputy assessors, the time for the completion of the assessment, and the powers and duties of the board of directors sitting as a board of equalization.

Sec. 22. [Levy of assessment.] "The board of directors shall then levy an assessment sufficient to raise the annual interest on the outstanding bonds," and the principal of such bonds as may be maturing that year. The secretary is to extend the tax on the assessment rolls. The assessment is to be paid into the district treasury. If the directors refuse to make the levy and assessment, the board of supervisors of the county shall act in their stead. And if the collector or treasurer of the district refuses to act, the

county tax collector or county treasurer shall perform his duties. [As amended, St. Cal. 1891, p. 147.]

Sec. 23. [Lien of assessment.] "The assessment upon real property is a lien against the property assessed from and after the first Monday in March for any year, and the lien for the bonds of any issue shall be a preferred lien to that for any subsequent issue, and such lien is not removed until the assessments are paid, or the property sold for the payment thereof." [As amended, St. Cal. 1891, p. 147.]

Sec. 24. [Delinquency of assessments.] This section relates to the delivery of the assessment book to the collector; to his notice of the assessment and of the time and place where it is payable; and to his attendance at the time and place specified, and giving receipts. Unpaid assessments become delinquent on the last Monday in December at 6 P. M., and thereafter bear an addition of five per cent. [As amended, St. Cal. 1891, p. 244.]

Sec. 25. Provides for publication of the delinquent list and notice of the time and place of sale for non-payment of the assessment. [Amended, St. Cal. 1891, p. 244.]

Sec. 26. Relates to the collection of penalties on delinquent assessments; and regulates the time, place, and manner of conducting the sale of property for non-payment. [Amended, St. Cal. 1891, p. 244.]

Secs. 27-33. [Sales for non-payment.] These sections are concerned with the collection of the assessments. They regulate the amount and description of land which may be sold for non-payment, giving the owner the right to designate the property to be sold; the resale of property not paid for by the purchaser; the issuance and effect of the tax certificate; the right of the owner to redeem, and the time and manner in which it may be exercised; the form, contents, and execution of the tax deed, and its effect as evidence; the effect of a mistake in the assessment or misno-



mer of the owner; and the time and manner of the collector's settlement with the secretary of the board. [Note. In so far as relates to the redemption of property sold for delinquent assessments, this part of the act was amended, or supplemented, by an act passed March 10, 1891; St. Cal. 1891, p. 53.]

Sec. 34. [Payment of bonds.] This section contains directions as to the payment of coupons on the bonds, and also provides for the redemption of bonds not yet due, out of the surplus funds of the district, when such funds, after ten years from the issuance of the bonds, amount to ten thousand dollars.

Sec. 35. [Contracts for construction of works.] "After adopting a plan of said canal or canals, storage reservoirs, and works, the board of directors shall give notice, by publication thereof, not less than twenty days, in one newspaper published in each of the counties composing the district (provided a newspaper is published therein) and in such other newspapers as they may deem advisable, calling for bids for the construction of such work, or of any portion thereof; if less than the whole work is advertised, then the portion so advertised must be particularly described in such notice. Said notice shall set forth that plans and specifications can be seen at the office of the board, and that the board will receive sealed proposals therefor, and that the contract will be let to the lowest responsible bidder, stating the time and place for opening said proposals, which, at the time and place appointed, shall be opened in public; and as soon as convenient thereafter the board shall let said work, either in portions or as a whole, to the lowest responsible bidder; or they may reject any or all bids and readvertise for proposals, or may proceed to construct the work under their own superintendence. Contracts for the purchase of material shall be awarded to the

lowest responsible bidder. Any person or persons to whom a contract may be awarded shall enter into a bond, with good and sufficient sureties, to be approved by the board, payable to said district for its use, for twenty-five per cent. of the amount of the contract price, conditioned for the faithful performance of said contract. The work shall be done under the direction and to the satisfaction of the engineer, and be approved by the board." [As amended, St. Cal. 1891, p. 142.]

Sec. 36. [Payment of claims.] "No claim shall be paid by the treasurer until allowed by the board, and only upon a warrant signed by the president and countersigned by the secretary." But the board may deposit in the county treasury any portion of the construction fund in excess of twenty-five thousand dollars. The county treasurer is responsible for money so deposited, and is to pay it out to the treasurer of the district on orders signed and attested. He is to make monthly reports of such receipts and disbursements.

Sec. 37. [Payment of expenses.] "The cost and expense of purchasing and acquiring property and constructing the works and improvements herein provided for, shall be wholly paid out of the construction fund. For the purpose of defraying the expenses of the organization of the district, and of the care, operation, management, repair, and improvement of such portions of said canal and works as are completed and in use, including salaries of officers and employes, the board may either fix rates of tolls and charges, and collect the same from all persons using said canal for irrigation and other purposes, or they may provide for the payment of said expenditures by a levy of assessments therefor, or by both said tolls and assessments; if by the latter method, such levy shall be made on the completion and equalization of the assessment roll, and the board shall

have the same powers and functions for the purposes of said levy as are now possessed by boards of supervisors in this state. The procedure for the collection of assessments by such levy shall in all respects conform to the provisions of this act relating to the payment of principal and interest of bonds herein provided for."

Sec. 38. [Crossing roads, etc.; right of way.] "The board of directors shall have power to construct the said works across any stream of water, water-course, street, avenue, highway, railway, canal, ditch, or flume which the route of said canal or canals may intersect or cross, in such manner as to afford security for life and property; but said board shall restore the same, when so crossed or intersected, to its former state as near as may be, or in a sufficient manner not to have impaired unnecessarily its usefulness; and every company whose railroad shall be crossed or intersected by said works shall unite with said board in forming said intersections and crossings, and grant the privileges aforesaid; and if such railroad company and said board, or the owners and controllers of said property, thing, or franchise so to be crossed, cannot agree upon the amount to be paid therefor, or the points or the manner of said crossings or intersections, the same shall be ascertained and determined in all respects as is herein provided in respect to the taking of land. The right of way is hereby given, dedicated, and set apart, to locate, construct, and maintain said works over and through any of the lands which are now or may be the property of this state; and also there is given, dedicated, and set apart, for the uses and purposes aforesaid, all waters and water rights belonging to this state within the district."

Sec. 39. Provides for the per diem compensation and mileage of the directors and the compensation of other officers.

Sec. 40. Prohibits any and all officers from having any interest in any contract to be awarded by the board or in the profits to be derived therefrom, under penalty of forfeiture of their office and fine and imprisonment.

Sec. 41. Provides for the calling of special elections to determine whether or not special assessments shall be levied.

Sec. 42. [Limit of indebtedness.] "The board of directors, or other officers of the district, shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this act; and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void, except that for the purposes of organization, or for any of the purposes of this act, the board of directors may, before the collection of the first assessment, incur an indebtedness not exceeding in the aggregate the sum of two thousand dollars, and may cause warrants of the district to issue therefor, bearing interest at seven per cent. per annum." [As amended, St. Cal. 1891, p. 142.]

Sec. 43. [Apportionment of water.] "In case the volume of water in any stream or river shall not be sufficient to supply the continual wants of the entire county through which it passes, and susceptible of irrigation therefrom, then it shall be the duty of the water commissioners, constituted as hereinafter provided, to apportion, in a just and equitable proportion, a certain amount of said water upon certain or alternate weekly days to different localities, as they may, in their judgment, think best for the interest of all parties concerned, and with due regard to the legal and equitable rights of all. Said water commissioners shall consist of the chairman of the board of directors of each of the districts affected."

Sec. 44. [Water to be kept flowing.] "It shall be the  
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duty of the board of directors to keep the water flowing through the ditches under their control to the full capacity of such ditches in times of high water.”

Sec. 45. [Mining rights protected.] “Navigation shall never in any wise be impaired by the operation of this act; nor shall any vested interest in or to any mining water rights or ditches, or in or to any water or water rights, or reservoirs or dams, now used by the owners or possessors thereof, in connection with any mining industry, or by persons purchasing or renting the use thereof, or in or to any other property now used directly or indirectly in carrying on or promoting the mining industry, ever be affected by or taken under its provisions, save and except that rights of way may be acquired over the same.”

Sec. 46. [Existing statutes not repealed.] “None of the provisions of this act shall be construed as repealing or in any wise modifying the provisions of any other act relating to the subject of irrigation or water commissioners. Nothing herein contained shall be deemed to authorize any person or persons to divert the waters of any river, creek, stream, canal, or ditch from its channel, to the detriment of any person or persons having any interest in such river, creek, stream, canal, or ditch, or the waters therein, unless previous compensation be ascertained and paid therefor, under the laws of this state authorizing the taking of private property for public uses.”

Sec. 47. “This act shall take effect immediately.”

## § 200. Statutes of Washington and Nevada.

In the state of Washington an act was passed, March 20, 1890,<sup>4</sup> which is substantially the same as the California statute set out in the preceding section, with the incorpora-

<sup>4</sup>1 Hill's St. Wash. §§ 1784-1861.

tion of most of the amendments and additions thereto. It is, in fact, in great part a literal transcript of that statute, and the system established is identically the same. The Washington act, however, is somewhat more full on the subject of changing the boundaries of districts, and of petitions to have lands included in, or excluded from, the district.

The "Wright act" has also been adopted in Nevada. The statute there in force, enacted in 1891, is founded upon the act mentioned, is exactly similar to it in all its important provisions, and is for the most part a literal copy of it.<sup>5</sup> The Nevada act includes the clauses relating to judicial proceedings for the confirmation of the issue and sale of the bonds. In its 50th section it provides that the act shall not repeal or in any wise modify the provisions of any other act relating to the subject of irrigation or water commissioners. In these two states, therefore, the California decisions construing this statute, will be entitled, on familiar legal principles, to very great attention and respect.

## § 201. Statute of South Dakota.

In the recent legislation of this state, we find "an act to authorize civil townships to sink artesian wells for public purposes and to issue bonds therefor."<sup>6</sup> It authorizes the formation of irrigation districts to be watered from such wells, and provides a system sufficiently resembling that in California, Washington, and Nevada to be classed in the same category of statutes. Its more important provisions are as follows:—

Sec. 1. "The water of the artesian basin underlying or

<sup>5</sup> St. Nevad. 1891, p. 106.

<sup>6</sup> Sess. Laws S. Dak. 1891, c. 80, p. 196.

being in the shale formation, in all townships in the state of South Dakota which shall petition for and sink artesian wells as hereinafter provided, and not heretofore appropriated, is hereby declared to be the property of the public and is dedicated to the use of the people of the state of South Dakota subject to appropriation as hereinafter provided.”

Sec. 2. Application may be made by twenty or more persons, each owning not less than eighty acres of land in any township, to the state engineer of irrigation, for the location of artesian wells in said township,—not more than nine six-inch wells, or not more than sixteen four-and-one-half-inch wells,—and the state engineer shall then locate such wells in such places as shall, in his judgment, best subserve the interests of all the resident land-owners of the township.

Secs. 3--5. The application and the engineer's report thereon shall be filed, and notice thereof shall be given to the board of supervisors.

Secs. 6--10. An election shall be held, upon prescribed notice, for the purpose of voting on the question of issuing bonds for the sinking of the wells.

Sec. 11. If the vote is in the affirmative, the board of supervisors shall, within three days, advertise for bids for the contracts for sinking and casing the wells.

Secs. 12--14. These sections relate to the filing of bids, the time of doing the work, and the approval and acceptance of the completed wells by the state engineer.

Sec. 15. The supervisors shall cause the water from the wells to be conveyed to the highest point of land in the tract to be irrigated.

Sec. 16. The person upon whose land the well is located shall deed one acre thereof to the township, with right of way from the highway to the well, and the right to lay

pipes from the well across the land to the lands of adjoining owners.

Sec. 17. Townships are authorized to receive conveyances of land, as in the preceding section.

Sec. 18. Any person owning land in the township who shall desire to be supplied with water from the well for irrigation shall apply to the supervisors, describing the tract to be irrigated and the number of acres.

Sec. 19. The supervisors shall then contract with such person to furnish him water at a price per acre-foot of water, such price not to exceed "a pro rata amount of eight per cent. of the bonds issued."

Secs. 20-22. The application and contract shall be filed with the register of deeds. The township shall have a lien on the lands for the water-rent. The township treasurer shall collect such rents.

Sec. 23. If the water-rents in any year do not amount to enough to pay the interest on the bonds, the necessary amount shall be raised by taxation. And after five years a sufficient tax shall be levied to provide a sinking fund for the payment of the principal of the bonds when due; but in no event shall the tax exceed three per cent. upon the taxable property of the township in any one year.

Sec. 24. Provision is made for the redemption of the bonds.

Sec. 34. "The state engineer shall prescribe rules and regulations for the distribution and use of water from public wells not in conflict with law, subject to the approval of the township board of supervisors."

Sec. 36. The water from the wells is to be applied first, for domestic purposes (defined as meaning household use, supply of domestic animals, and watering trees, grass, flowers, and shrubbery about the house of the consumer in an



area of not more than half an acre); second, for purposes of irrigation. But power may be leased for manufacturing purposes, whenever the use of the wells for such purposes will in no manner obstruct or materially diminish the waters for irrigation purposes.

Sec. 42. "Any person, association, or corporation owning lands shall have the right to sink or bore an artesian well or wells on his, their, or its lands, for the purpose of procuring water for domestic use, for irrigation, or for manufacturing purposes; but in wells hereafter constructed no more water shall be appropriated by such person, association, or corporation than is needed for said purposes, when such additional use of water interferes with the flow of wells on adjacent lands."

Sec. 49. "Whenever any township in which an incorporated village is or shall be located, shall be desirous of sinking an artesian well for domestic and general public purposes under the provisions of this act, it shall be lawful for the incorporated village to join with the township in voting upon the question of bonding; the electors of the entire township, including the village, shall vote upon the question of bonding in the same manner as if there was no separate incorporated village; and the bonds so issued shall be a lien upon all taxable property of the township and village alike."

Sec. 50. "The township board of supervisors shall keep all wells, ditches, dams, pipes, and appurtenances in good repair, at the expense of the township, and shall pay for the same out of the township funds not otherwise appropriated."

## § 202. Statute of Utah.

In this territory, an act of 1884 provides a system for the organization and government of irrigation districts which

resembles, in many respects, the statutes already described.<sup>7</sup> The following synopsis will be found to embrace its most important provisions:

Sec. 2403. [Organization of district.] "Upon the majority of the citizens of any county or part thereof representing to the county court that more water is necessary, and that there are streams or parts of streams unclaimed or unused, which, if brought out of their natural channels and thrown upon tracts of land under cultivation, or to be put under cultivation, can be of value to the interests of agriculture, the county court having jurisdiction may proceed to organize the county, or part thereof, into an irrigation district; and thereafter the landholders of such district shall be equally entitled to the use of the water in, or to be brought into, such district, according to their acknowledged rights; provided, such landholders pay their proportion of the expense incurred in the construction and keeping in repair of the necessary canals, flumes, dams, or ditches."

Sec. 2404. [Choice of trustees.] "The citizens of an irrigation district, when so organized for the purposes provided in the preceding section, may, in mass meeting, proceed to the formation of a company, by electing viva voce not less than three nor more than thirteen trustees, a secretary, and a treasurer." Notice of this meeting is to be given ten days previous, by published and posted advertisements.

Sec. 2405. The trustees shall then locate the proposed canal or ditch, determine the land to be benefited thereby, estimate the cost of the works, and calculate the rate of taxation on land necessary to pay for the same.

Sec. 2406. [Election.] The trustees having reported to the county court, a meeting shall be called of the owners of lands to be benefited by the proposed canal, at which a

<sup>7</sup>2 Comp. Laws Utah, 1888, §§ 2403-2427, being act of March 13, 1884.

vote shall be taken on the willingness of the said owners to pay the estimated tax, and on their approval of the action of the mass meeting in the election of officers. Notice of the election shall be given, and the voting shall be by ballot. Landholders in the district are alone entitled to vote.

Sec. 2407. [Tax.] If two-thirds of the votes are in the affirmative, "then the tax so agreed upon shall be a law in the said irrigation district, and the tax when collected shall be paid over to the treasurer of said company on his order." But not more than half of the tax shall be collected at one time, and the residue shall be collected as the work progresses. And provided that if the first estimate proves insufficient for the construction of the works, additional taxes may be assessed in the same manner as already provided until the canal or ditch is completed.

Sec. 2408. [Effect of less vote.] If less than two-thirds of the votes are cast in the affirmative, all proceedings shall be null and void. But other persons than those nominated by the mass meeting may be elected to the offices.

Secs. 2409, 2410. These sections contain provisions relating to the bonds of officers and their term of office.

Sec 2411. [Elections.] This section provides for annual elections for determining the rate of taxation, and biennial elections of officers. "The votes at said election shall be by acreage and not per capita. The right to use the water for one acre of land shall entitle the owner to one vote. The tax voted by a majority vote at said election shall be a lien on all water rights until paid, from the day of assessing the same, but not upon any land." [As amended by act of Mar. 10, 1892; Laws Utah, 1892, c. 36, p. 38.]

Sec. 2412. [Duties of trustees.] The trustees are to elect one of their number as president; make by-laws, rules, and regulations; appoint agents, subordinates, and officers;

employ workmen; appoint assessors and collectors, or make agreement with the county assessors to assess and collect the tax; construct and complete the canals and other works; keep accounts of receipts and disbursements; make annual reports to the county court; and file a map of the irrigation district, showing the location and subdivision of land therein and of the company's canals and ditches.

Sec. 2413. [Powers of trustees.] "The trustees shall have power to sue and be sued, plead and be impleaded, to have and to hold all such real estate and personal property as may be necessary to construct the contemplated ditch or canal, including all appurtenances belonging thereto."

Sec. 2414. [Vacant lands.] "If any part of the lands to be benefited by the proposed ditch or canal are not legally claimed, then such lands may be appraised by the trustees and shall be held and the possession of them sold by the trustees, as opportunity may offer, and the estimated amount of funds necessary to complete such canal or ditch shall be decreased by the estimated value of such lands, previous to the levy and assessment of any tax."

Sec. 2415. [Streams rising in other counties.] "Where the streams to be taken out for irrigation purposes come from other counties than the one in which the district is situated, but where there are no existing claims to the water, and where no individual or settlement will be injured thereby, then the power of said irrigation district is hereby extended to said other county, insomuch as said extension may be necessary for the construction of dams to turn the waters, and ditches or canals with all necessary appurtenances as may be necessary to convey the same to where it is to be used."

Sec. 2416. [Reservoirs.] Lakes or ponds in natural basins may be used as reservoirs, but "the waters of such lakes or

ponds are in no case to be raised, by dams or otherwise, so as to interfere with or damage settlers upon the margin thereof."

Sec. 2417. [Ownership of works; cost of repairs.] The canals, ditches, and reservoirs, upon their construction or partial construction, become the property of the irrigation district; and the funds necessary for repairing the same, keeping them in order, or altering or enlarging them, are to be raised by a tax on the lands benefited, to be voted as above provided. But in case of a sudden emergency, caused by inundation or otherwise, the trustees are authorized to act on their own responsibility and levy a tax for the necessary amount.

Sec. 2418. [Exemption from taxation.] "All property or money belonging to any irrigation district, in the hands of the trustees to be expended by them under the provisions of this act, is hereby exempted from all city, county, and territorial taxes."

Sec. 2419. [Purchase of property.] After the canal or ditch has been laid out, "the trustees or company may agree with the owners of land through which it will pass for the purchase of so much thereof as may be necessary for the making of the canal or ditch and the appurtenances thereto belonging."

Secs. 2420--2422. [Condemnation of right of way.] These sections provide for the ascertainment of the value of the land necessary for the company's right of way, in case of disagreement with the owner, for its appraisal by referees mutually chosen or by commissioners appointed by the court, and for the acquisition of title by the trustees upon paying or tendering the assessed damages.

Sec. 2423. [Injury to property of district.] Penalties are denounced against persons willfully or maliciously injuring or interfering with the canal or other property of the dis-

tract, or wrongfully appropriating the water, or using more than has been duly distributed to them, or changing its flow. [Note. This section was supplemented by an act approved Mar. 11, 1890 (Laws Utah, 1890, c. 28, p. 21), which provides that "any person or company who shall raft or float timber or wood down any river or stream of this territory shall not allow such timber or wood to accumulate at or obstruct the water-gates owned by any person or irrigation company taking or diverting the water of said river or stream for irrigation or manufacturing purposes. Any person violating the provisions of this act shall be guilty of a misdemeanor."]

Sec. 2424. [Company liable for damages.] All companies or districts organized under the provisions of this act shall be liable for any damage which may occur by the breaking of any canal or ditch. No such company shall be entitled to divert the waters of any stream to the injury of any irrigation company or person holding a prior right to the use of said waters.

It will be observed that the foregoing statute makes no provision for the condemnation of existing water rights. On the contrary, such rights are expressly saved, and the act applies only to "unclaimed or unused" waters.

### § 203. Constitutionality of these statutes.

The constitutional validity of the statute of California providing for the organization and government of irrigation districts, set forth in a preceding section, has been definitely and finally affirmed by the supreme court of that state. As the decisions so holding are of the greatest interest and importance, both in that jurisdiction and also in those states which have adopted the essential features of the California legislation on this subject, we feel justified in noticing them at considerable length.

The whole question was very fully and carefully considered in the case of the Bonds of the Madera Irrigation District.<sup>8</sup> The validity of the act was there objected to on the ground that it was not within the scope of the legislative power; that it was local and special in its nature; that it unlawfully delegated legislative powers; that the measures which it authorized were not of a public nature, or for the benefit of the public; and also on various specific grounds hereinafter noticed. Against all these objections the constitutionality of the law was sustained. The opinion of the court was delivered by Harrison, J., from whose remarks we extract the following quotations, as giving the gist of the reasoning by which the validity of the law was maintained:

“That the legislature is vested with the whole of the legislative power of the state, and that it has authority to deal with any subject within the scope of civil government, except in so far as it is restrained by the provisions of the constitution, and that it is the sole tribunal to determine as well the expediency as the details of all legislation within its power, are principles so familiar as hardly to need mention. The declaration in article 4, § 1, of the constitution, ‘The legislative power of this state shall be vested in a senate and assembly, which shall be designated “The Legislature of the State of California,”’ comprehends the exercise of all the sovereign authority of the state in matters which are properly the subject of legislation; and it is incumbent upon any one who will challenge an act of the legislature as being invalid to show either that such act is without the province of legislation, or that the particular subject-matter of that act has been by the constitution, either by express provision or by necessary implication,

<sup>8</sup> 92 Cal. 296, 28 Pac. Rep. 272.

withdrawn by the people from the consideration of the legislature. The presumption which attends every act of the legislature is that it is within its power, and he who would except it from the power must point out the particular provision of the constitution by which the exception is made, or demonstrate that it is palpably excluded from any consideration whatever by that body.

“In providing for the welfare of the state and its several parts, the legislature may pass laws affecting the people of the entire state, or, when not restrained by constitutional provisions, affecting only limited portions of the state. It may make special laws relating only to special districts, or it may legislate directly upon local districts, or it may intrust such legislation to subordinate bodies of a public character. It may create municipal organizations or agencies within the several counties, or it may avail itself of the county or other municipal organizations for the purposes of such legislation, or it may create new districts embracing more than one county, or parts of several counties, and may delegate to such organizations a part of its legislative power to be exercised within the boundaries of said organized districts, and may vest them with certain powers of local legislation, in respect to which the parties interested may be supposed more competent to judge of their needs than the central authority.”

“In providing for the public welfare, or in enacting laws which in the judgment of the legislature may be expedient or necessary, that body must determine whether or not the measure proposed is for some public purpose. We do not mean by this that the declarations of the legislature that an act proposed by it will be for the public good will of necessity preclude an investigation therein, or that such declaration will be conclusive when the act itself is palpably otherwise. . . . But if the



subject-matter of the legislation be of such a nature that there is any doubt of its character, or if by any possibility the legislation may be for the welfare of the public, the will of the legislature must prevail over the doubts of the court. . . . Whenever it is apparent from the scope of the act that its object is for the benefit of the public, and that the means by which the benefit is to be attained are of a public character, the act will be upheld, even though incidental advantages may accrue to individuals beyond those enjoyed by the general public. . . .”

“The same rules of construction must be applied to the exercise of legislative authority in authorizing an expenditure for a local improvement. Such authorization is a legislative declaration that the expenditure is for a public purpose, and for the welfare of the public, and its action is not to be disregarded by the courts upon an assumption by them that such legislation is unwise, or that it may be injurious to some of the individuals who are affected by it. In determining whether any particular measure is for the public advantage it is not necessary to show that the entire body of the state is directly affected thereby, but it is sufficient that that portion of the state within the district provided for by the act shall be benefited thereby. The state is made up of its parts, and those parts have such a reciprocal influence upon each other that any advantage which accrues to one of them is felt more or less by all of the others. A legislature that should refrain from all legislation that did not equally affect all parts of the state would signally fail in providing for the welfare of the public. In a state as diversified in character as is California, it is impossible that the same legislation should be applicable to each of its parts. Different provisions are as essential for those portions whose physical characteristics are different as are needed in the provisions which are made

for the government of town and country. Those portions of the state which are subject to overflow, and those which require drainage, as well as those which for the purpose of development require irrigation, fall equally within the purview of the legislature, and its authority to legislate for the benefit of the entire state, or for the individual district. The power of the legislature to adapt its laws to the peculiar wants of each of these districts rests upon the same principle, viz., that it is acting for the public good in its capacity as the representative of the entire state. . . .”

“We have not been cited to the statute of any other state which provides for irrigating arid lands, or to any authority in which the power of the legislature over the subject is discussed. But we have no hesitation in saying that the principles upon which the decisions to which we have referred were made are applicable to sustain the legislative authority in making provision for such irrigation. Whether the reclamation of the land be from excessive moisture to a condition suitable for cultivation, or from excessive aridity to the same condition, the right of the legislature to authorize such reclamation must be upheld upon the same principle, viz., the welfare of the public, and particularly of that portion of the public within the district affected by the means adopted for such reclamation. Whatever tends to an increased prosperity of one portion of the state, or to promote its material development, is for the advantage of the entire state; and the right of the legislature to make provision for developing the productive capacity of the state, or for increasing facilities for the cultivation of its soil according to the requirements of the different portions thereof, is upheld by its power to act for the benefit of the people in affording them the right of ‘acquiring, possessing, and protecting the property’ which is guarantied to them by the constitution. The local improvement contem-

plated by such legislation is for the benefit and general welfare of all persons interested in the lands within the district, and is a local public improvement. This principle is not contravened by the fact that it may even operate injuriously upon some of the individuals or proprietors of land within the district, or by the fact that there may be some who for personal motives may wish to resist the improvement. Such result is only a sacrifice which the individual makes to the general good in compensation for the advantages enjoyed by virtue of the social compact. All laws of this character are upheld upon the same principle as is the creation of a district for any other local improvement, such as the opening of a highway, or of a street, or of a public park. The legislature, to which has been confided the matter, has determined that it will be for the public good that such street or park be opened, and it has imposed the burden of such opening upon the property within a limited district. In each of such instances the land taxed for the improvement may not be the only land that will be benefited. Although land adjacent to the district may be incidentally benefited, that is no reason for taxing such land, nor is it any objection to the proceeding that some of the property within the district will not receive any benefit, or that the improvement will more specifically benefit those who have procured its creation. . . . The means by which the legislature may exercise this power are left to its own discretion, except as it may be limited by the constitution. If, in the exercise of its care for the public welfare, it finds that a specific district of the state needs legislation that is inapplicable to other parts of the state, it may, in the absence of constitutional restrictions, legislate directly for that district, or, if it be the case that similar legislation be required for other portions of the state, it may provide

for adapting such legislation to those portions at the will of the people in such districts, as was done in the reclamation and levee laws already referred to. It may, too, by general laws authorize the inhabitants of any district, under such restrictions, and with such preliminary steps as it may deem proper, to organize themselves into a public corporation for the purpose of exercising those governmental duties, upon the same principle as it authorizes the incorporation of any municipal corporation under general laws. The constitution of California has been framed with the principle of investing separate subdivisions of the state with local government, and especially authorizes the legislature to confer the power of local legislation upon such subdivisions within the state as may be organized under its authority. The legislature is itself forbidden to interfere in any manner, except by general laws, with the power of local legislation intrusted to such organizations, nor can it delegate to any but public corporations the power to perform any municipal functions whatever, or vest in any but the corporate authority of a municipal corporation the power to assess and collect taxes for any municipal purpose. But, although the legislature is prevented from passing any special or local law which shall be applicable to only a particular portion or district of the state, its power of legislation for the public good in that portion of the state has not been destroyed. It still retains the full power of legislation conferred upon it in the constitution, but is required to exercise such power in the mode prescribed in that instrument. It may pass general laws which from their nature will be capable of enforcement in only particular portions of the state; or it may by other general laws authorize the organization of municipal corporations, which, from the nature of the functions intrusted to them, can find occasion for organization only

in certain portions of the state, and it may by such general laws provide for the organization of such and as many species of municipal corporations as in its judgment are demanded by the welfare of the state, and the 'protection, security, and benefit of the people,' for which government is instituted, and which has been by the people confided to it. Const. art. 1, § 2. The provision in article 11, § 6, of the constitution, 'Corporations for municipal purposes shall not be created by special laws' does not imply that the legislature must by any general law provide a plan in which shall be prescribed the mode under which all municipal corporations must be organized, and the powers that they can exercise. The provision in article 12, § 1, that private corporations 'may be formed under general laws, but shall not be created by special act,' although more explicit, and, under the declaration of the constitution itself, (article 1, § 22,) 'mandatory' rather than permissive, requiring that they must be formed under general laws, has never been construed as requiring that all private corporations must be formed under the same general law, or limited to the exercise of the same powers. On the contrary, the form of organization, as well as the powers to be exercised, have been by legislation adapted to the character of the corporation to be organized. All corporations of the same class are required to be organized in the same manner, but the nature of the organization does not permit, nor does the constitution require, that corporations of different classes shall be organized in the same manner, or provided with the same powers. Hence the provisions that have been made by the legislature for the organization and powers of railroad, insurance, religious, mining, and other business corporations have been adapted to their respective character and needs. With greater propriety has it been left to the legislature to provide the

mode of organization and the powers to be exercised by different species of municipal corporations. Such corporations are but the agents or representatives of the state in the particular locality in which they exist. They are organized for the purpose of carrying out the purposes of the legislature in its desire to provide for the general welfare of the state, and in the accomplishment of which legislative convenience or constitutional requirements have made them essential. Although in this state the legislature is required to provide such agencies under general laws, it is authorized, under its general power of legislation, to invest such corporations, when created, with the same powers which without such restriction it could itself have exercised; and in providing for such organizations it need confer upon them only such powers as in its judgment are proper to be exercised by them in the discharge of the particular functions of government which may be conferred upon them. Being the representatives of the legislature in the various localities of the state, the requirements for organization, as well as the powers to be exercised, vary with the character of the purpose for which they may be created. Hence the general laws which the legislature may enact for the organization of public corporations may be as numerous as the objects for which such corporations may be created. For each of these objects the law is the same, but there would be a manifest impropriety in requiring that the organization of a levee district or an irrigation district should be conducted in the same manner as the organization of a corporation for the management of a public park, or the control of the school department. Whether the districts to which such general laws are applicable, or in which the people thereof may avail themselves of the privilege conferred, be many or few, is immaterial. Even if there be but a single district to which the law is

applicable at the time of its enactment, the legislature would be justified under its legislative power to pass general laws, in making such provision for that district. Whenever a special district of the state requires special legislation therefor, it is competent for the legislature by general law to authorize the organization of such district into a public corporation, with such powers of government as it may choose to confer upon it. . . .”

“It is contended that the act is unconstitutional for the reason that it is a delegation of the legislative power to create a corporation. If by this is meant that only the legislature can create such corporation, the answer is that the constitution prohibits such action. If it is meant that the corporation is not ‘created’ until the voters of the district have accepted the terms of the act, the answer is that such proceeding is in direct accord with the principles of the constitution. Having the power to create municipal corporations, but being prohibited from creating them by special laws, the only mode in which such corporations could be created under a general law would be by some act on the part of the district or community seeking incorporation, indicative of its determination to accept its terms. As the constitution has not limited or prescribed the character of such general law, its character and details are within the discretionary power of the legislature. We know of no more appropriate mode of such indication than the affirmative vote of those who are to be affected by the acceptance of the terms of the act. The municipal corporations which may be thus created are not limited to cities and towns. . . .”

“In the present case, the legislature has chosen to authorize the creation of a public corporation, in the manner and with the forms specified in the act under discussion. For this purpose it has provided that a petition of fifty

freeholders, or a majority of the freeholders owning lands within a proposed district susceptible of one mode of irrigation, shall be presented to the board of supervisors of the county within which such lands are situate, and that the board of supervisors shall, upon the hearing of such petition, after notice thereof, determine whether or not it will take steps to organize an irrigation district; and that upon such determination an election shall be ordered, at which, if two-thirds of the electors within the district shall vote in favor of such organization, the district shall thereupon be organized, and its management confided to a board of directors chosen by the electors of that district. It is objected to this that it is placing in the hands of those not interested the power of imposing a burden upon the owners of the land, who may be a small minority of the electors within that district, or who may be even non-residents of the district. This, however, is a matter which was addressed purely to the discretion of the legislature. Whether such a petition shall be made by the owners of a fixed proportion of the land, as was required in the reclamation law, or whether there should be any qualification to the petitioners, or whether there should be any limit to the expenses which they were authorized to incur for the purposes of the improvement, are questions which were solely for the consideration of the legislature. It is not for this department of the government to question the policy or the prudence of a co-ordinate branch. If those who are affected by its proceedings feel that it has not given them sufficient protection, or placed sufficient safeguards around the institution of the corporation, they must seek redress from that body. We can only act upon the law as it has been enacted. It must be observed, however, that this petition has no binding operation, but is merely the initiatory step which gives to the board of super-



visors a jurisdiction to act upon the expediency or policy of authorizing the creation of the district. That body is the representative of the county, and has been chosen by its electors for the express purpose of legislation upon local subjects, and may naturally be supposed to have the interests of the entire county, as well as of each of its parts, in charge, and to be acquainted with its needs and requirements. The legislature has not, however, intrusted that body with the final determination of the question, but has authorized it to submit the question to a vote of the electors of the district, and it is only when these electors have determined by a vote of two-thirds of their number in favor thereof that the district can be created as a political body. The objection that this vote may be carried by a majority of those who have no interest in the lands affected thereby is but an incident, and not of the essence of the matter. It is no more than exists in every popular vote which involves the creation of a municipal debt or the adoption of a municipal organization. The fact that the owners of the lands are non-residents within the district, and not allowed a voice in the proceedings, is of the same character. . . ."

"The constitutionality of the act in question is further assailed upon the ground that it makes no provision for a hearing from the owners of the land prior to the organization of the district. But the steps provided for the organization of the district are only for the creation of a public corporation, to be invested with certain political duties which it is to exercise in behalf of the state. *Dean v. Davis*, 51 Cal. 406. It has never been held that the inhabitants of a district are entitled to notice and hearing upon a proposition to submit such question to a popular vote. In the absence of constitutional restriction, it would be competent for the legislature to create such public corporation, even against the will of the inhabitants. It has

as much power to create the district in accordance with the will of a majority of such inhabitants. It must be observed that such proceeding does not affect the property of any one within the district, and that he is not by virtue thereof deprived of any property. Such result does not arise until after delinquency on his part in the payment of an assessment that may be levied upon his property, and before that time he has opportunity to be heard as to the correctness of the valuation which is placed upon his property, and made the basis of his assessment. He does not, it is true, have any opportunity to be heard, otherwise than by his vote, in determining the amount of bonds to be issued, or the rate of assessment with which they are to be paid; but in this particular he is in the same condition as is the inhabitant of any municipal organization which incurs a bonded indebtedness or levies a tax for its payment. His property is not taken from him without due process of law, if he is allowed a hearing at any time before the lien of the assessment thereon becomes final.<sup>9</sup>

“It is also objected that the mode provided for the payment of the bonds is unconstitutional, in that it provides for an assessment upon the real property within the district according to its value, and not according to the benefit which each particular parcel of land may derive from the improvement. The power of the legislature in matters of taxation is unlimited, except as restricted by constitutional provisions. This is one of the attributes of sovereignty which the people have placed in its hands; and they have intrusted its exercise to its discretion, either in the manner or to the extent to which it is to be applied. All taxation

<sup>9</sup> Citing *People v. Smith*, 21 U. S. 701, 4 Sup. Ct. Rep. 663; *N. Y.* 595; *Gilmore v. Hentig*, *Davies v. Los Angeles*, 86 Cal. 33 *Kans.* 170, 5 *Pac. Rep.* 781; 46, 24 *Pac. Rep.* 771. *Hagar v. Reclamation Dist.*, 111

has its source in the necessities of organized society, and is limited by such necessity, and can be exercised only by some demand for the public use or welfare. And, whether the tax be by direct imposition for revenue or by assessment for a local improvement, it is based upon the theory that it is in return for the benefit received by the person who pays the tax, or by the property which is assessed. For the purpose of apportioning this benefit, the legislature may determine in advance what property will be benefited, by designating the district within which it is to be collected, as well as the property upon which it is to be imposed, or it may appoint a commission or delegate to a subordinate agency the power to ascertain the extent of this benefit. It may itself declare that the entire state is benefited, and authorize the burden to be borne by a public tax, or it may declare that all or a portion of the property within a limited region is benefited, either according to its value or in proportion to its actual benefit, to be specifically ascertained by actual determination of officers appointed therefor. . . ."

"It is, however, for the legislature to determine how the apportionment shall be made, and, while it is held that an apportionment of the expenses for a local improvement is to be made according to the benefits received by the property assessed, yet the power to make such apportionment rests upon the general power of taxation, and the apportionment itself does not depend upon the fact of local benefit in any other sense than that all taxes are supposed to be based upon the benefit received by the tax payer. . . ."

"It is not necessary to show that property within the district may be actually benefited by the local improvement, and, even if it positively appear that no benefit is received, such property is not thereby exempted from bearing its

portion of the assessment, nor is the act unconstitutional because it provides that such property shall be assessed. Property that is exempt from taxation has always been held subject to the burdens of assessment for local improvements, and property within a district that is not susceptible of receiving any immediate benefit from the improvement is nevertheless so indirectly benefited thereby that it must bear a portion of the burden. If within the limits of a levee district a parcel of land should be so situated as not to require the protection of the levee, that would be no reason for excluding it from its share of the expense, or, if within the limits of a drainage district there should chance to be found a cliff, that would be no reason for exempting it from assessment. The objection that the legislature has no authority to confer upon the supervisors of the county the right to create a corporation whose district shall embrace a portion of the territory of another county does not arise in the present case. It is not contended that any portion of the Madera irrigation district lies outside of the county of Fresno."

On a re-hearing in this case, it was further decided that the statute in question is not in violation of that clause of the California constitution which prohibits certain public corporations from incurring indebtedness "without the assent of two-thirds of the qualified electors thereof," as that prohibition is limited to "county, city, town, township, board of education, or school-district" corporations.<sup>10</sup>

<sup>10</sup> In re Bonds of Madera Irr. 18 Pac. Rep. 379; Central Irr. Dist., 92 Cal. 296, 28 Pac. Rep. Dist. v. DeLappe, 79 Cal. 351, 675. See, also, Turlock Irr. 21 Pac. Rep. 825.  
Dist. v. Williams, 76 Cal. 360,

**§ 204. Irrigation districts are public, but not municipal, corporations.**

The determination of the status of districts organized under these laws becomes important in connection with various constitutional and statutory provisions relating to public, private, and municipal corporations respectively. As the authorities now stand, it may be said to be settled that such irrigation districts are to be classed as "public corporations," as distinguished from private corporations, but that they do not fall within the narrower class of "municipal corporations" properly so called.

The supreme court of California has twice ruled that such districts are not private corporations, but public. In one of the cases so holding, we find the theory sustained by the following course of reasoning: "That an irrigation district, organized under the act in question, becomes a public corporation, is evident from an examination of the mode of its organization, the purpose for which it is organized, and the powers conferred upon it. It can be organized only at the instance of the board of supervisors of the county,—the legislative body of one of the constitutional subdivisions of the state; its organization can be effected only upon the vote of the qualified electors within its boundaries; its officers are chosen under the sanction and with the formalities required at all public elections in the state,—the officers of such election being required to act under the sanction of an oath, and being authorized to administer oaths when required for the purpose of conducting the election; and the officers when elected being required to execute official bonds to the state of California, approved by a judge of the superior court. The district officers thus become public officers of the state. When organized, the district can acquire, either by purchase or condemnation, all property necessary for the construction

of its works, and may construct thereon canals, and other irrigation improvements; and all the property so acquired is to be held by the district in trust, and is dedicated for the use and purposes set forth in the act, and is declared to be a public use, subject to the regulation and control of the state. For the purpose of meeting the cost of acquiring this property, the district is authorized, upon the vote of a majority of its electors, to issue its bonds; and these bonds, and the interest thereon, are to be paid by revenues derived under the power of taxation, and for which all the real property in the district is to be assessed. Under this power of taxation, one of the highest attributes of sovereignty, the title of the delinquent owner to the real estate assessed, may be divested by sale, and power is conferred upon the board of directors to establish equitable by-laws, rules, and regulations for the distribution and use of water among the owners of said lands, and generally to perform all such acts as shall be necessary to fully carry out the purpose of the act. Here are found the essential elements of a public corporation, none of which pertain to a private corporation. The property held by the corporation is in trust for the public, and subject to the control of the state. Its officers are public officers chosen by the electors of the district, and invested with public duties. Its object is for the good of the public, and to promote the prosperity and welfare of the public."<sup>11</sup>

On the other hand, the supreme court of the state of Washington has decided that an irrigation district is not a municipal corporation, within the meaning of a constitutional provision that "no county, city, town, school district, or other municipal corporation" shall incur an in-

<sup>11</sup> In re Bonds of Madera Irr. Dist. v. DeLappe, 79 Cal. 351, Dist., 92 Cal. 296, 28 Pac. Rep. 21 Pac. Rep. 825.  
272. See, also, Central Irr.

debtedness in excess of a certain percentage of its taxable property.<sup>12</sup> From the opinion in the case cited we extract the following remarks: "We are forced to the conclusion that every public corporation formed by the state for the purpose of carrying out any of the duties which the state owes to any locality, and which by its terms are made alike applicable to all the inhabitants of the district or locality affected thereby, must be held to be included within the 'other municipal corporations' named in said section. It does not follow, however, that every corporation which may be constituted by the state as an agency in the performance of some public or quasi public duty comes within said definition. One of the essentials of a municipal corporation is that for the purposes for which it is organized it must affect all within its boundaries alike, and this is true, even although such corporation is constituted for a single purpose; for instance, a school district, though organized only for the purpose of providing means and furnishing facilities for the education of its children, yet affects all the tax payers of such district alike. The same may be said of a county. It has only limited powers, it is true, but those powers are to be exercised in the interest of all the inhabitants of the county alike. Such is not the case with corporations formed under the provisions of the act in question, for, while it is true that its powers and privileges are subject to the will of the majority of the electors therein, yet when it acts thereunder it does not equally affect all of its inhabitants. The act does not provide that its purposes shall be carried out by means of a tax on all the property within the district, but, on the contrary, expressly limits it to the real estate situated therein, and which is judged to be benefited by the improve-

<sup>12</sup> Board of Directors Middle Kittitas Irr. Dist. v. Peterson, (Wash.) 29 Pac. Rep. 995.

ment contemplated. It will thus be seen that, even if we are to hold that every corporation which the legislature sees fit to make use of for the purpose of aiding in the government of any district or locality, or providing for the inhabitants thereof any right or privilege common to them all, was a 'municipal corporation,' within the inhibition of said constitutional provision, yet it would not follow that corporations of the kind contemplated by this act were also municipal corporations. The powers conferred upon these irrigation districts are not primarily that of government or regulation, or even of taxation, though such are conferred to a limited degree as necessarily incident to the main power conferred. The primary and main power thus conferred is that of local improvement of the real estate therein for the benefit of its owners, and at their expense. In one sense, the district thus constituted is not a public corporation at all; its object has no connection with any of the public duties which the state owes to its inhabitants. In a certain sense, it is only the purely private interest of the freeholders that is sought to be subserved. If, in the absence of constitutional provisions prohibiting special legislation, the legislature saw fit to provide that the farms of three adjoining proprietors should be improved by the erection of a dyke or the excavation of a ditch upon certain provisions therein provided, we do not think it would be claimed that the three farms and their owners were by said act constituted a public corporation, and we are certain that such legislation would not create a municipal corporation, in any sense whatever. The act in question is of substantially the same kind as would be such special act. It is true that it may be extended throughout a large area, and affect the rights of a large number of people; but it must be remembered that it does not affect their rights in the way that ordinary municipi-



pal corporations do. They pay taxes, it is true, or an assessment in the nature of a tax, but it is not for the benefit of the community at large within such districts, but for the special benefit of the owners of real estate situated therein, and is proportioned to the benefits which they are to receive from the improvement. In a certain sense, no "tax," in the ordinary use of that word, is imposed. Each owner of land contributes to a common fund, and receives back from such fund the exact amount of his contribution. Such is not the nature of a tax levied in any of the corporations which have been held to be municipal corporations. In those every tax payer must pay his taxes according to the value of his property, regardless of the question as to whether or not his property is directly benefited thereby. In the contemplation of law he may be benefited, but such benefit is not the direct and immediate consequence of the payment of the tax, as in the case of these districts. In a school district every property owner has to pay a tax, regardless of the question whether or not his children are to be benefited by the schools to be maintained therein, and, so far as we know, this reasoning may be applied to every corporation which has been held to be municipal. It is practically conceded by the respondent that these districts constitute public corporations, and not municipal ones, if, under our constitution, the words 'public' and 'municipal,' as thus applied, have not been made substantially synonymous. Such words are no doubt used at times as expressing substantially the same idea, but it is conceded that in the usual and ordinary sense the word 'public' is a broader term than the word 'municipal,' and includes, not only municipal corporations, but others of a public character, which are not in the ordinary sense 'municipal.'

"But it is claimed on the part of the respondent that

the provisions of our constitution are such as to abrogate this distinction, and make it the duty of courts in interpreting the same to construe these words as being synonymous. This argument is gathered largely from the wording of said section 6 of article 8, which, as we have seen before, classes as municipal corporations school districts and counties as well as cities and towns; the argument of respondent in this regard being that, as school districts and counties belong to the class of public as distinguished from municipal corporations, the constitution in classing them therewith intended to do away with all distinction between them. In our opinion, such a result does not follow, though it must be conceded that the effect thereof has been to enlarge the definition of 'municipal' so that corporations will fall within that class which would not otherwise have done so. But it does not follow that there cannot be corporations which are of a public or quasi public nature which are so different in all their powers, characteristics, and objects from either counties or school districts as not to fall within the definition of 'other municipal corporations' used in connection therewith. If the effect of such section was as contended for by the respondent, then the constitution makers did not keep up throughout the entire constitution the idea that such distinction had been abrogated, as they naturally would have done; for in various other sections of the constitution we find the words 'public' or 'municipal' used together, where the use of both was entirely unnecessary if the distinction between them had been abrogated. See sections 13, 15, art. 11. Besides, the use of terms in the constitution must be interpreted in the light of legislation existing at the time, and, upon an examination of the legislation in force in this state at the date of the adoption of the constitution, it will be clearly seen that a well-defined distinction, as between

'public' and 'municipal,' as applied to corporations, existed. The constitution clearly recognizes the importance of improvements of the kind sought to be furthered by this legislation, and yet to interpret the section under consideration as contended for by the respondent would take from the legislature the power to deal with the subject in any effective manner. The improvement contemplated in the creation of the districts is a local one, in the interest of property benefited, and has nothing whatever to do with the taxing power; and it is impossible that this legislation could be sustained upon the ground that the bonds proposed to be issued were not a 'debt' within the meaning of the constitutional provisions relating thereto, but were simply evidences of the fact that a special assessment for the improvement of property benefited had been made, and the payment thereof provided for in installments, as stated in said bonds. This would, perhaps, be a strained construction of the legislation; but, rather than to hold the same unconstitutional, it might be our duty to thus construe it. We are, however, better satisfied to hold that these districts, although undoubtedly 'corporations' in a certain sense, and perhaps 'public corporations,' are not 'municipal corporations' within the meaning of said section of the constitution. Such seems to us the reasonable construction of such constitutional provision as applied to the act under consideration, and we should probably sustain the legislation without bringing to its aid the rule of construction above stated; and, in the light of said rule, our duty to do so is clear." The California decisions do not appear to have been noticed or referred to in this case.<sup>13</sup>

<sup>13</sup> As to the distinctions between public, private, and municipal corporations, see further, *Dartmouth College v. Woodward*, 4 Wheat. 518, 562,

668; *Randle v. Del. Canal Co.*, 1 Wall. Jr. 290; *Miners' Ditch Co. v. Zellenbach*, 37 Cal. 577; *Ang. & A. Corp.* § 32.

**§ 205. Organization of district.**

The board of supervisors, to which is addressed the petition for the organization of an irrigation district, is the sole judge of the sufficiency of the bond accompanying the petition. And it is also to judge of the sufficiency of the petition itself in the first instance. But the record of the board, stating that there was evidence, to the satisfaction of the board, on the question whether there were the required number of bona fide freeholders within the boundaries of the proposed district who had signed the petition, is not conclusive, or even competent evidence, to show the legality of the proceedings, when the question arises in the special statutory proceeding for a judicial confirmation of the organization of the district; for in that case it is the duty of the court to examine and determine for itself the validity of the proceedings. Again, the statutory requirement that the petition shall particularly set forth and describe the boundaries of the district sought to be organized, does not mean that they should be described with any greater degree of particularity than would be necessary in an act of the legislature creating a particular district or a municipal corporation. And the proceedings for the organization of the district are not to be adjudged defective, though the order by the supervisors for the issuing of the bonds did not conform strictly to the statute, since the statute may be followed by the board of directors when issuance of bonds by them becomes necessary.<sup>14</sup>

**§ 206. Including and excluding territory.**

In California, and in those states which have copied its legislation on the subject of irrigation districts, the pro-

<sup>14</sup> The foregoing points were all ruled in the case of Bonds of Madera Irr. Dist., 92 Cal. 296, 28 Pac. Rep. 272. The courts have no power to dissolve an irrigation district on the ground of

non-user of its franchises, since the statute makes no provision for any such proceeding. *People v. Selma Irr. Dist.* (Cal.), 32 Pac. Rep. 1047.

vision of law is that the board of supervisors shall not include within such a district "any lands which will not, in the judgment of said board, be benefited by irrigation by said system."<sup>15</sup> As to the construction of this provision, the supreme court of California holds that it is not the duty of the supervisors "to exclude by demarkation every minute tract or parcel of land that happens to be covered by a building or other structure which unfits it for cultivation; and certainly the law could not be so construed without disregarding many of its express provisions, and at the same time rendering it practically inoperative. We construe the law to mean that the board may include within the boundaries of the district all lands which in their natural state would be benefited by irrigation, and are susceptible of irrigation by one system, regardless of the fact that buildings or other structures may have been erected here and there upon small lots, which are thereby rendered unfit for cultivation at the same time that their value for other purposes may have been greatly enhanced. So construed, we can see no objection to the law upon constitutional grounds or grounds of expediency. As to owners of such property, it seems reasonable to assume that they must participate, indirectly at least, in any benefits the district may derive from the successful inauguration of a system of irrigation; but aside from this, the law contains an express provision designed to secure to them a benefit exactly corresponding to any burden to which they may be subjected, and in that respect is far more equitable than many of the assessment laws which have been upheld here and elsewhere. The provision referred to is this: Every tax payer of the district receives a portion of all the water distributed exactly equivalent to his proportion of the total

<sup>15</sup> St. Cal. 1887, p. 30, § 2.

tax levied, and this water is his to use or to sell, as he may elect; so that if his lot is not fit for cultivation, he nevertheless gets a full equivalent for the tax assessed to him.”<sup>16</sup> Fortified by this reasoning, the court felt justified in holding that a city or town, or a portion thereof, may, in a proper case, in the discretion of the board of supervisors, be included in an irrigation district. In the case at bar, it appeared that the district contained about 108,000 acres of land, including the city of Modesto, a town covering about 2,000 acres and having about 3,000 inhabitants and about 600 dwelling-houses, besides shops, etc. On this branch of the case it was remarked: “One proposition of the appellant seems to be that the mere fact of the corporate existence of a town or city, though situate in the midst of a district susceptible of irrigation by one system, necessarily deprives the board of supervisors of the county of the power to include any of the lands within the corporate limits of such city or town in an irrigation district. We say this seems to be a proposition of the appellant, because, although it is not expressly stated in terms, it appears to be necessary to sustain his contention; for, if it lies within the discretion of the board to include in an irrigation district any part of the lands of a town or city upon the ground that in their judgment such part will be benefited by irrigation under the system proposed, and if the judgment of the board upon the question of benefits is conclusive of the fact,—as we shall show that it is,—there is no ground upon which a court can say that an order including all the lands of a city or town in such district is void. The idea of a city or town is, of course, associated with the existence of streets, to a greater or less extent lined with shops and stores, as well as of dwelling-houses, but it is also a noto-

<sup>16</sup> St. Cal. 1887, p. 34, § 11.

rious fact that in many of the towns and cities of California there are gardens and orchards inside the corporate boundaries requiring irrigation. It is equally notorious that in many districts lying outside of the corporate limits of any city or town there are not only roads and highways, but dwelling-houses, outhouses, warehouses, and shops. With respect to these things, which determine the usefulness of irrigation, there is only a difference of degree between town and county. The advantages of irrigation to a town like Riverside, in San Bernardino county, for instance, no one could deny; and the difference between such a town and these places where irrigation would be as manifestly out of place are not marked by any hard and fast line which would enable a court to lay down a rule of discrimination. The question whether in any particular case a town will, as a whole, be benefited directly by the application of water for irrigation, is in its nature, and under existing conditions must remain, a question of fact to be decided by that tribunal to whose discretion it had been committed by the legislature."<sup>17</sup> We therefore learn further, from this case, that upon the question of fact as to what lands will or will not be benefited by irrigation, the decision of the board of supervisors is conclusive.

A statute of California supplementary to the Wright act provides that if there be any outstanding bonds, no order of exclusion of part of the district can be made without the consent of the bondholders.<sup>18</sup> In a case where there was an understanding between the bidders and the directors that the former were not to be held to their offer unless they could effect a sale of the bonds, and the bonds were never issued or paid for, and prior to the order of exclusion

<sup>17</sup> Board of Directors of Modesto Irr. Dist. v. Tregoe, 88 Cal. 334, 26 Pac. Rep. 237.

<sup>18</sup> St. Cal. 1889, p. 23, § 6.

the bidders had been released from their offer, it was held that the decree of validity of the order of exclusion rendered by the lower court was proper.<sup>19</sup>

### § 207. Levy of assessments.

Upon a comparison of the various provisions of the Wright act, the courts have reached the conclusion that an assessment of taxes cannot be levied by the directors of an irrigation district—even for the payment of current expenses and wages and salaries—without a previous authorization by a vote of the electors of the district. And whereas it is provided that the directors may call an election for the purpose of submitting the question of such assessment “when in their judgment it may be advisable,” this merely means that if, in their judgment, an assessment is advisable, they shall call an election. In other words, their judgment is to be directed to the advisability of levying an assessment, not to the advisability of calling an election, as to which they have no discretion.<sup>20</sup>

### § 208. Proceedings for confirmation of bonds.

Since the validity of the bonds of an irrigation district, when issued, depends upon the regularity of the proceedings of the board of directors, and upon the ratification of the proposition by a majority of the electors, it soon became evident that investors were unwilling to take such bonds at their par value, while all the facts affecting their validity remained open to question and dispute. To meet this inconvenience,—for the security of investors, and to enable the irrigation districts to dispose of their bonds on advantageous terms,—the legislature of California, in 1889,

<sup>19</sup> Board of Directors of Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. Rep. 237.

<sup>20</sup> Tregea v. Owens, 94 Cal. 317, 29 Pac. Rep. 643.



passed an act supplementary to the Wright law, by which it is provided that the board of directors of any irrigation district may "commence a special proceeding in and by which the proceedings of said board and of said district providing for and authorizing the issue and sale of the bonds of said district, whether said bonds or any of them have or have not been sold, may be judicially examined, approved, and confirmed."<sup>21</sup> It was at first contended that confirmation proceedings, under this act, could not be commenced until the bonds had actually been issued. But the supreme court held that the board of directors might institute such proceedings as soon as any resolution for the issue and sale of bonds had been adopted by them.<sup>22</sup> The statute provides that the court shall direct publication of a notice of the filing of the petition in the same manner and for the same length of time as is provided for a notice of special election, stating the time and place for the hearing of the petition, and that any person interested in the organization may on or before the day of the hearing demur to or answer said petition. And it is held that this notice is sufficient to confer jurisdiction upon the court.<sup>23</sup> The notice is sufficient in itself if it states the substance of the prayer in the petition.<sup>24</sup> And the prayer of the petition is sufficient if it prays for the examination, approval, and confirmation of the proceedings "aforesaid" for the issue and sale of bonds of the district.<sup>25</sup> And an order of confirmation entered in such proceedings is conclusive, as to a proper compliance with all the provisions of the Wright act, on a land-owner of the district who did not appear at the confirmation proceedings, but who seeks to

<sup>21</sup> St. Cal. 1889, p. 212.

<sup>22</sup> Board of Directors of Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 Pac. Rep. 237.

<sup>23</sup> Id.

<sup>24</sup> Id.

<sup>25</sup> Id.

enjoin the sale of the bonds. The confirmation proceeding being a proceeding in rem, the land-owner is bound thereby, if there has been due publication of the notice in accordance with the terms of the statute, notwithstanding there has been no personal service of notice upon him.<sup>26</sup>

<sup>26</sup> Crall v. Board of Directors of Madera Irr. Dist., 92 Cal. Poso Irr. Dist., 87 Cal. 140, 26 296, 28 Pac. Rep. 272. Pac. Rep. 797. See In re Bonds

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## CHAPTER XII.

### STATE SUPERVISION OF DISTRIBUTION AND USE OF WATER.

[By the Editor.]

- § 209. Characteristics of this system.
- 210. Statute of Wyoming.
- 211. Statute of Colorado.
- 212. Statute of Nevada.
- 213. Statute of Idaho.
- 214. Statute of Arizona.
- 215. Powers of water commissioners.

#### § 209. Characteristics of this system.

The class of statutes to be considered in the present chapter differ from those which we have heretofore discussed, in that they do not contemplate the appropriation or condemnation of water rights by public or private corporations, organized for that purpose. But they provide a system by which existing appropriations or vested rights are ascertained and protected, future appropriations are regulated, and the distribution and use of the available water-supply are placed under restrictions designed to promote economy and to secure a just apportionment of the indispensable element among all the consumers according to their respective rights. These ends are attained by subjecting the appropriation and use of the streams to the supervision and control of a body of public officers, whose powers and duties are described in the summaries of the statutes which here follow.

#### § 210. Statute of Wyoming.

In the state of Wyoming, a statute was enacted in 1890,<sup>1</sup> on the subject of the "supervision and use of the waters

<sup>1</sup> Laws Wyom. 1890-91, c. 8, p. 91.

of the state," which was intended to furnish a complete system in that regard, and which repealed most of the prior legislation on the subject.<sup>2</sup> This statute provides for a division of the state into water districts, with public officers in each having control of the appropriation and use of the waters therein. But it differs from the legislation of California and Washington, in that these districts are not quasi-municipal corporations, and that the law relates not merely to the use of water for irrigation but for all other purposes as well. Its important provisions may be epitomized as follows:

Secs. 1-5. The state is divided into four "water divisions," and their respective territories are described.

Secs. 6-12. [State engineer.] These sections relate to the state engineer, his appointment, qualification, duties, and compensation. He is to "make measurements and calculations of the discharge of streams from which water shall be taken for beneficial purposes, . . . collect facts and make surveys to determine the most suitable location for constructing works for utilizing the water of the state, and to ascertain the location of the lands best suited for irrigation. He shall examine reservoir sites, and shall, in his reports, embody all the facts ascertained by such surveys and examinations, including, wherever practicable, estimates of the cost of proposed irrigation works and of the improvement of reservoir sites. He shall become conversant with the waterways of the state and the needs of the state as to irrigation matters, and in his reports to the governor he shall make such suggestions as to the amendment of existing laws, or the enactment of new laws, as his information and experience shall suggest, and he shall keep in his office full and proper records of his work, obser-

<sup>2</sup> Particularly, it repeals the greater part of title 19 of the Revised Statutes ("Of Irriga- tion"), and the act of Mar. 8, 1888 (Laws Wyom. 1888, p. 115).

vations, and calculations." He is to report to the governor biennially, and oftener if required.

Secs. 13-18. [Division superintendents.] There shall be one division superintendent appointed for each water division. "The superintendent of each water division shall have immediate direction and control of the acts of the water commissioners and of the distribution of water in his water division. . . . He shall, under the general supervision of the state engineer, execute the laws relative to the distribution of water, in accordance with the rights of priority of appropriation." He may make additional regulations to secure the equal and fair distribution of water. "All water commissioners shall make reports to the division superintendent of their division, as often as may be deemed necessary by said superintendent."

Secs. 19-33. [Board of control.] A "board of control" is created, composed of the state engineer and the superintendents of the four water divisions. Their primary duty is to hear and determine all conflicting claims to priority of right in the appropriation of public waters, beginning with those streams which are most used for irrigation.

Secs. 34-39. [Appropriation of water.] These sections regulate all future appropriations of water, and are evidently intended to prevent any confusion or conflict in the rights of appropriators thereafter arising. Briefly stated, it is provided that any person or corporation desiring to appropriate any of the public waters of the state shall first make an application to the state engineer for a permit to make such appropriation. This application is to be accompanied by a full and detailed description of the source and amount of the proposed appropriation and of the works by which the applicant intends to make it effective, and of the purposes for which the water is to be used. "If there is unappropriated water in the source of supply named in the

application, and if such appropriation is not otherwise detrimental to the public welfare," the state engineer shall authorize the applicant to proceed with his works. Otherwise he shall refuse to sanction the appropriation. But in the latter case, the applicant may appeal to the board of control, and ultimately to the proper district court. If the application is approved and allowed, the appropriator is to file a map of the source of supply, location of works, and district to which the water is applied. He will then receive from the board of control a certificate of his appropriation. The priority of the appropriation shall date from the filing of the application in the engineer's office.

Secs. 40-45. [Water commissioners.] The board of control shall divide the state into water districts, having regard to the best protection of the claimants for water, and the most economical supervision on the part of the state. One commissioner shall be appointed for each district. "It shall be the duty of the said water commissioner to divide the water in the natural stream or streams of his district, among the several ditches taking water therefrom, according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut and fastened, under the direction of the superintendent of his water division, the head-gates of ditches heading in any of the natural streams of the district, when, in time of scarcity of water, it is necessary so to do by reason of the priority of rights of others taking water from the same stream or its tributaries." But "said water commissioners shall not begin their work until they have been called upon by two or more owners or managers of ditches or persons controlling ditches in the several districts, by application in writing, stating that there is a necessity for the use of water; and they shall not continue performing services after the necessity therefor shall cease."

### § 211. Statute of Colorado.

In Colorado we find a statute,<sup>3</sup> providing for a division of the state into six "water divisions" and sixty-eight "water districts," with water commissioners, division superintendents, and a state engineer, constituting a system similar in many respects to that in Wyoming. Thus, the powers and duties of the water commissioners are substantially the same; they are to divide the water, shut head-gates in times of scarcity, not to act until called upon by two or more owners, etc. The "superintendent of irrigation" for each division shall have general control over the water commissioners in his division, execute the laws of the state relative to the distribution of water in accordance with the rights of priority of appropriation, make regulations, and receive reports from the commissioners. The state engineer "shall have general supervising control over the public waters of the state;" he shall measure the flow of water in streams and compute the discharge; collect information as to dams and reservoirs, and the feasible and economical construction of such works on eligible sites, also in regard to the snow-fall in the mountains, so as to predict the probable flow of water in the streams; approve plans and designs for dams and embankments more than ten feet high; have general charge of the work of the superintendents and commissioners; furnish them with data and information and require them to report to him; and make reports to the governor.

But this statute lacks the excellent feature of the Wyoming act which provides that applications for the right to appropriate water must be made to, and passed upon by, the board of control.

<sup>3</sup> 1 Mills' Ann. St. Colo. §§ 2310-2392, and 2440-2469.

**§ 212. Statute of Nevada.**

In this state, a law was enacted in 1889,<sup>4</sup> providing for the appointment of water commissioners, whose duty it shall be "to divide the water in the natural lakes or streams of their districts among the several ditches taking water from the same, according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut and fastened, the head-gates of any ditch or ditches heading in any of the natural streams or lakes of the district, which, in time of a scarcity of water, makes it necessary by reason of the priority of the rights of others above or below them on the stream." This act also contains an elaborate system for the judicial determination of conflicting claims of priority.

**§ 213. Statute of Idaho.**

In this state, there is a statute relating to the distribution of water for purposes of irrigation, which provides for the creation of water or irrigation districts, and for the election of a "water master" in each, and minutely prescribes his duty of superintending the ditches, their repair, the distribution of water among consumers, etc.<sup>5</sup>

**§ 214. Statute of Arizona.**

In this territory, a law is in force which bears sufficient resemblance to the foregoing statutes to be classed with them, although it also differs from them in some important particulars.<sup>6</sup> The following summary will sufficiently indicate its leading features.

Sec. 3211. "Immediately after the publication of this

<sup>4</sup> St. Nevad. 1889, p. 107.

<sup>5</sup> Rev. St. Ariz. 1887, §§ 3211-

<sup>6</sup> Rev. St. Idaho, §§ 3200-3205. 3223.



chapter, it shall be the duty of the several justices of the peace in this territory to call together, in their respective precincts, all the owners and proprietors of land irrigated by any public acequia, for the purpose of electing one or more overseers for said acequia for the corresponding year."

Sec. 3212. Manner of conducting such election; none entitled to vote except owners and proprietors of land, as above.

Sec. 3213. A majority of the electors shall determine the pay and perquisites of the overseers.

Sec. 3214. "It shall be the duty of the overseers to superintend the opening, excavations, and repairs of said acequias; to apportion the number of laborers furnished by the owners and proprietors; to regulate them according to the quantity of land to be irrigated by each one from said acequia; to distribute and apportion the water in proportion to the quantity to which each one is entitled, according to the land cultivated by him; and, in making such apportionment, he shall take into consideration the nature of the seed sown or planted, the crops and plants cultivated; and to conduct and carry on such distribution with justice and impartiality."

Sec. 3215. "During years when a scarcity of water shall exist, owners of fields shall have precedence of the water for irrigation according to the dates of their respective titles or their occupation of the lands, either by themselves or their grantors. The oldest titles shall have precedence always."

Sec. 3216. "It shall be the duty of each of the owners and proprietors to furnish the number of laborers required by the overseer, at the time and place he may designate, for the purposes mentioned in the foregoing section, and for the time he may deem necessary."

Sec. 3217. Penalty for neglect or misconduct of overseer.

Sec. 3218. New election to fill the place of an overseer removed from office.

Sec. 3219. Owner neglecting to furnish laborers as required shall be fined.

Sec. 3220. Penalties provided for injuries to acequias, or for interference with or obstruction of them.

### § 215. Powers of water commissioners.

Water commissioners, invested by law with such powers and prerogatives as are described in the statutes above set forth, are merely agents selected for the public convenience to regulate the distribution of water according to the rights of the parties in interest. It is held that their action in distributing water does not prevent the parties from applying to the courts for relief, nor does it prevent the courts from granting relief, if to any one is distributed more than his just proportion of the water.<sup>7</sup> It is not thought that any valid objection could be maintained, on constitutional grounds, to the powers with which these commissioners are invested by the laws of Wyoming, Colorado, Nevada, Idaho, and Arizona, as above set forth. But it should be remarked that an early statute of Montana, creating the office of water commissioners, was pronounced unconstitutional, on the ground that it attempted to confer upon them powers which were judicial in their nature and which could not be granted by the legislature. The court said: "They are empowered by the act to apportion the waters in a just and equitable proportion. This required them to determine what was just and equitable between these parties. In the next place, the apportionment was to be made with a due regard to the legal rights of all. This required of them to determine what these legal rights were."<sup>8</sup>

<sup>7</sup> Dailey v. Cox, 48 Cal. 127.  
See Pico v. Colimas, 38 Cal. 578.

<sup>8</sup> Thorp v. Woolman, 1 Mont.

## CHAPTER XIII.

## RIPARIAN RIGHTS ON NAVIGABLE STREAMS.

[By the Editor.]

- § 216. What streams are navigable.
- 217. Navigable waters of the United States.
- 218. Floatable streams.
- 219. Paramount control of congress.
- 220. Title of state to bed of stream.
- 221. Limit of riparian owner's estate.
- 222. Incidents of state's ownership of bed of stream.
- 223. Rivers as boundaries between states.
- 224. Navigable stream as boundary.
- 225. Public right of navigation.
- 226. Right of state to improve navigation.
- 227. Public right of floating logs.
- 228. Public use of banks of stream.
- 229. Rights of riparian owner in general.
- 230. Right to build wharves and landings.
- 231. Right to reclaim submerged lands.
- 232. Preferential right to purchase.

## § 216. What streams are navigable.

By the English common law, the meaning of the term "navigable streams" was restricted to those streams in which the tide ebbs and flows. And this definition has been so far followed in this country that any river or creek which is affected by the daily rise and fall of the tide is regarded as public and navigable, and subject to the rules governing such waters, unless it is affirmatively shown that it is in fact incapable of being used for purposes of navigation. Thus it is said that the common law principle applies to our rivers so far as the rise and fall is governed by the oceanic tides, although there may be no actual current up the river, and although the water be not salt or brackish.<sup>1</sup>

<sup>1</sup> People v. Tibbetts, 19 N. Y. 523.

But in so far as the common law rule limits the class of navigable streams to those affected by the tide, it has not been generally adopted in this country. The courts of the United States, for the purpose of determining the extent of federal jurisdiction and the application of federal laws, have discarded this rule altogether, and taken as the sole test the actual navigable capacity of the given stream. "The doctrine of the common law as to the navigability of waters," says the supreme federal tribunal, "has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all, of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide-water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide-water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must therefore be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers, in law, which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."<sup>2</sup> And the rule thus formulated has been adopted in nearly all the states. So that it may now be said to be the general doctrine of the American common law that

<sup>2</sup>The *Daniel Ball*, 10 Wall. 563; *The Genesee Chief*, 12 How. 443

any water is "navigable water" if it is navigable in fact and available as a highway for commerce.<sup>3</sup> And further, the question of navigability does not materially depend upon past or present actual public use. Such use may establish navigability, but it is not essential to give that character. If it were otherwise, streams in new and unsettled portions of the country, or where the increase, growth, and development have not been sufficient to call them into public use, would be excluded, though navigable in fact, thus making the character of being a navigable stream dependent on the occurrence of the necessity of public use. Capability of being used for useful purposes of navigation, of trade and travel, in the usual and ordinary modes, and not the extent and manner of the use, is therefore the true test of navigability.<sup>4</sup> But the stream must admit of being used as a highway for commerce of an essentially valuable character, and the mere fact that it offers a passage-way for boats or vessels does not always or necessarily determine its character as navigable water in the American sense.<sup>5</sup> And where the whole of a river is above

<sup>3</sup> *The Montello*, 20 Wall. 441; *Weise v. Smith*, 3 Oreg. 445; *Haines v. Hall*, 17 Oreg. 165, 20 Pac. Rep. 831; *Nutter v. Gallagher*, 19 Oreg. 375, 24 Pac. Rep. 250; *Shaw v. Oswego Iron Co.*, 10 Oreg. 371; *American River Water Co. v. Amsden*, 6 Cal. 443; *Concord Manuf. Co. v. Robertson*, (N. H.) 25 Atl. Rep. 718; *Sullivan v. Spotswood*, 82 Ala. 166, 2 South. Rep. 716; *Stover v. Jack*, 60 Pa. St. 339; *Diedrich v. Northwestern R. Co.*, 42 Wis. 248; *Elder v. Burrus*, 6 Humph. 358; *Brown v. Chadbourne*, 31 Me. 9; *McManus v. Carmichael*, 3 Iowa, 1; *Monongahela Bridge*

*Co. v. Kirk*, 46 Pa. St. 112; *Hickok v. Hine*, 23 Ohio St. 523; *Walker v. Allen*, 72 Ala. 456; *Broadnax v. Baker*, 94 N. Car. 675; *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. Rep. 60.

<sup>4</sup> *Sullivan v. Spotswood*, 82 Ala. 166, 2 South. Rep. 716.

<sup>5</sup> *Burrows v. Gallup*, 32 Conn. 493; *Ledyard v. Ten Eyck*, 36 Barb. 102. But in Minnesota it is said that the test of navigability to be applied to our inland lakes must be sufficiently broad and liberal to include all the public uses, including boating for pleasure, for which such waters are adapted. So long as they continue capable of be-

tide-water it is *prima facie* non-navigable, and the burden of proving that it is impressed with the character of a public highway is on the person asserting it.<sup>6</sup>

There are some few states, however, which still adhere to the common law test of navigability. Thus in New Jersey, it is said that a river may be legally navigable below the ebb and flow of the tide and actually navigable above, and the question of boundary, in respect to lands adjoining it, will be determined by one principle above and by another below tide-water; but as to the jurisdiction and power of the state over it, the river above tide-water is to be regarded as navigable.<sup>7</sup> The courts of Illinois hold that the Mississippi is not legally and technically a "navigable river," and hence the title of a riparian proprietor whose land abuts on that stream extends to the middle thread of the river.<sup>8</sup> In Mississippi, it is said that the term "navigable," at common law, had reference only to such waters as were by the law of nations free to the commerce and navigation of all nations, and not to the capacity of a stream for navigation, and hence "navigable river" means only that part of a fresh-water stream, debouching into the sea, in which the tide ebbs and flows. And accordingly it is there held that the Mississippi is not technically a navigable stream above tide-water.<sup>9</sup> It is further to be remarked that a change in the condition of a non-navigable body of water, whereby it becomes or is made navigable, is not allowed to divest the previously acquired rights of

ing put to any beneficial public use, they are public waters. *Lamprey v. Metcalf*, (Minn.) 53 N. W. Rep. 1139. See *Attorney General v. Woods*, 108 Mass. 436.

<sup>6</sup> *Olive v. State*, 86 Ala. 88, 5 South. Rep. 653.

<sup>7</sup> *Attorney General v. Dela-*

*ware & Bound Brook R. Co.*, 27 N. J. Eq. 1.

<sup>8</sup> *Middleton v. Pritchard*, 4 Ill. 510. In *Ensminger v. People*, 47 Ill. 384, the court refused to depart from the rule laid down in this case or to reconsider it.

<sup>9</sup> *Steamboat Magnolia v. Marshall*, 39 Miss. 109.

riparian owners. Thus where, by the cutting of a channel between a fresh-water pond and a body of salt water, the water of the former becomes salt and the tide ebbs and flows therein, the rights of the riparian proprietors are not affected by the change; that is, their boundaries are not moved back to the newly formed line of high water mark.<sup>10</sup>

### § 217. Navigable waters of the United States.

The determination of the navigability of a river or stream may become important either with respect to state law or federal law. The constitution of the United States invests congress with the power to regulate foreign and interstate commerce, and commerce includes navigation. It also provides that the federal judicial power shall extend to "all cases of admiralty or maritime jurisdiction." It is therefore apparent that, for these purposes, the federal authorities may and must determine what waters are navigable, and this without being in any manner bound by the doctrines of the states including or contiguous to such waters. For example, Illinois holds that the Mississippi is not technically a "navigable river;" yet that does not exclude the river, or any part of it, from the jurisdiction of the United States for its proper purposes. On the other hand, it is evident that there may be streams navigable in fact, and yet so situated that neither the commercial power of congress nor the admiralty jurisdiction of the federal courts can properly be extended to them. It is accordingly settled that these two powers of the national government are restricted to the "navigable waters of the United States." And we are now to inquire into the meaning of this phrase. In the first place, as to the test of navigability, the courts of the United States, as was stated in the

<sup>10</sup> *Wheeler v. Spinola*, 54 N. Y. 377.

preceding section, have entirely discarded the common law doctrine, and have made navigability in law synonymous with navigability in fact, irrespective of the influence of the tide. And in the second place, as to what navigable waters are navigable waters "of the United States," the scope of this term has been clearly defined by the supreme court. The rivers of the country, says that tribunal, "constitute navigable waters of the United States, within the meaning of the acts of congress, in contradistinction from the navigable waters of the states, when they form, in their ordinary condition, by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries, in the customary modes in which such commerce is conducted by water."<sup>11</sup>

It is therefore not necessary that a river, to answer this description, should flow in a course between two or more states, or traverse the territory of several states, if it constitutes a part of an unbroken line of waterway available for interstate commerce. For instance, the Willamette river, though lying wholly within the state of Oregon, yet forms, by means of its connection with the Columbia river, a highway for foreign and interstate commerce, and is therefore a navigable river of the United States, and subject as such to the control of congress.<sup>12</sup> And even a canal, used by vessels engaged in interstate traffic as a public waterway, though entirely within the limits of one state having exclusive control of it, with power in such state to close it at any time, is a part

<sup>11</sup> The *Daniel Ball*, 10 Wall. 563; *The Genesee Chief*, 12 How. 443; *Escanaba Co. v. Chicago*, 107 U. S. 682, 2 Sup. Ct. Rep. 185; *Miller v. Mayor of N. Y.*, 109 U. S. 385, 3 Sup. Ct.

Rep. 228; *United States v. Burlington, etc., Ferry Co.*, 21 Fed. Rep. 331.

<sup>12</sup> *Wallamet Iron Bridge Co. v. Hatch*, 19 Fed. Rep. 347.



of the navigable waters of the United States, and subject to the jurisdiction of its admiralty courts.<sup>13</sup> On the other hand, a lake or river which is completely within the limits of a state, without any navigable outlet to any other state or country, is a navigable water of the state (but not of the United States) and is not within the jurisdiction of the federal government.<sup>14</sup> And it is also ruled that statutes passed by the states for their own uses, declaring small streams navigable, do not make them so within the meaning of any constitutional provision, treaty, or ordinance of the United States.<sup>15</sup>

### § 218. Floatable streams.

In those states where lumbering is a principal industrial interest, it has been found necessary to establish a new rule in respect to the use of the streams, which is not founded upon any principle or precedent of the common law, but solely upon the local exigencies and customs. This rule is, that a fresh-water stream which is capable of being used for the purpose of floating down logs to the mills or to market, although it may be too small to admit of navigation, is "navigable" (or more properly "floatable") and a public highway, in the sense that the general public have an easement of passage over it for that purpose, though the title to the bed of the stream may remain in the riparian owners, subject to such public easement.<sup>16</sup>

<sup>13</sup> The "B. & C.," 18 Fed. Rep. 543.

<sup>14</sup> United States v. Burlington, etc., Ferry Co., 21 Fed. Rep. 331.

<sup>15</sup> Duluth Lumber Co. v. St. Louis Boom Co., 17 Fed. Rep. 418.

<sup>16</sup> Shaw v. Oswego Iron Co., 10 Oreg. 371; Felger v. Robin-

son, 3 Oreg. 455; Nutter v. Gallagher, 19 Oreg. 375, 24 Pac. Rep. 250; Brown v. Chadbourne, 31 Me. 9; Thompson v. Improvement Co., 54 N. H. 545; Carter v. Thurston, 58 N. H. 104; Moore v. Sanbourne, 2 Mich. 520; Herman v. Beef Slough Manuf. Co., 1 Fed. Rep. 145.

According to the New Hampshire court, "the easement is not founded upon custom, usage, or prescription, nor is it derived from previous enjoyment, but it depends upon the capacity of the stream for trade or business. It exists where the stream is capable of being generally and commonly used for the purpose of commerce for the floating of vessels, boats, rafts, or logs. A riparian owner cannot acquire a prescriptive right against the public to impede or in any way injure navigation or any other public easement in any of the waters of the state."<sup>17</sup> In order to impress a stream with this character of floatability, it is not essential that it should be perennially available for the purpose mentioned. "In order to make a stream floatable, it is not necessary that it should be so at all seasons of the year. It is sufficient if it have that character at different periods with reasonable certainty and for such a length of time as to make it profitable for that purpose."<sup>18</sup> So the court in Alabama observes: "We are not to be understood as affirming that to be a navigable stream or public highway it must be susceptible of the enumerated uses for the entire year. Most inland streams contain a greater volume of water in winter than in summer. Our precise meaning is that for a season, or considerable part of the year, it must contain that depth of water which fits it for such transportation. It excludes all those streams which have the requisite volume of water only occasionally, as the result of freshets, and for brief periods, as unnavigable and private property."<sup>19</sup> In Oregon, it is said that it is sufficient if the periods of high water in the stream, or its navigable capacity, continue a suffi-

<sup>17</sup> Collins v. Howard, (N. H.)  
18 Atl. Rep. 794.

<sup>18</sup> Holden v. Robinson Manuf.  
Co., 65 Me. 215.

<sup>19</sup> Morrison v. Coleman, 87  
Ala. 655, 6 South. Rep. 374.

cient length of time to make it useful for a highway.<sup>20</sup> And this doctrine cannot be extended so as to include small streams of only a few miles in length, although they rise during a few weeks in the year sufficiently high to be used to a limited extent, by the application of artificial means, to float logs and timber a short distance.<sup>21</sup> And the stream must be something more than a mere brook. Although it may serve to float down logs for a few days during a freshet, that does not make it a public highway. Whether it is the one or the other depends upon its capacity, extent, and importance.<sup>22</sup> And in California it is said that a stream is navigable if it is capable of floating rafts of lumber, but that to go beyond this and declare any stream navigable which can float a log, would be to turn a rule intended for the benefit of the public into an instrument of serious detriment to individuals, if not of actual oppression.<sup>23</sup> It is also held that streams not naturally fitted for floating logs do not become public through their improvement by the riparian owner.<sup>24</sup> And in Oregon, there is a ruling to the effect that an artificial channel opened by an individual for his special use, and capable of floating logs for a few days in the year and at high water only is not subject to the public easement.<sup>25</sup>

### § 219. Paramount control of congress.

The settled doctrine of the federal courts is that congress "having power to regulate commerce with foreign nations and among the several states, and navigation being a

<sup>20</sup> Shaw v. Oswego Iron Co., 10 Ore. 371. See, also, Felger v. Robinson, 3 Ore. 455.

<sup>21</sup> Haines v. Hall, 17 Ore. 165, 20 Pac. Rep. 831.

<sup>22</sup> Haines v. Welch, 14 Ore. 319, 12 Pac. Rep. 502.

<sup>23</sup> American River Water Co. v. Amsden, 6 Cal. 443.

<sup>24</sup> Wadsworth v. Smith, 11 Me. 278.

<sup>25</sup> Nutter v. Gallagher, 19 Ore. 375, 24 Pac. Rep. 250.

branch of that commerce, it has the control of all navigable waters between the states, or connecting with the ocean, so as to preserve and protect their free navigation. Its power, therefore, to determine what shall be deemed, so far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive."<sup>26</sup> But there must be a direct statute of the United States in order to bring within the scope of its laws obstructions and nuisances in navigable streams within a state; such obstructions and nuisances being offenses against the laws of the states within which the navigable waters lie, but not offenses against the United States in the absence of a statute.<sup>27</sup> Hence, until congress acts, each state has plenary authority over rivers lying within its limits, and over bridges spanning them, and may regulate the construction, repair, and use of such bridges.<sup>28</sup> But "while this court has maintained, in many cases, the right of the states to authorize structures in and over the navigable waters of the states, which may either impede or improve their navigation, in the absence of any action of the general government in the same matter, the doctrine has been laid down with unvarying uniformity, that when congress has, by any expression of its will, occupied the field, that action was conclusive of any right to the contrary asserted under state authority."<sup>29</sup> Included in this power of congress is the authority to regulate and improve the navigation of such rivers and to make regulations for their ports. It has the power, for instance, to close one of several channels

<sup>26</sup> *Miller v. Mayor of New York*, 109 U. S. 385, 3 Sup. Ct. Rep. 228.

<sup>27</sup> *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. Rep. 811.

<sup>28</sup> *Willson v. Blackbird Creek*

*Marsh Co.*, 2 Pet. 245; *Gilman v. Philadelphia*, 3 Wall. 713; *Escanaba Co. v. Chicago*, 107 U. S. 678, 2 Sup. Ct. Rep. 185.  
<sup>29</sup> *Wisconsin v. Duluth*, 96 U. S. 379.

in a navigable stream, if, in its judgment, the navigation of the river will be thereby improved; and it may declare that an actual obstruction is not, in the view of the law, an illegal one.<sup>30</sup> So it has authority to build light-houses for commercial purposes; and although the land used for that purpose has been granted by the state to a private owner, yet, if it lies wholly under "navigable water of the United States," such owner is not entitled to compensation for damages resulting from the erection of such structures.<sup>31</sup> In regard to wharves, it has been held that although they are related to commerce and navigation as aids and conveniences, yet, being local in their nature and requiring special regulations at particular places, the jurisdiction and control thereof, in the absence of congressional legislation on the subject, properly belongs to the states in which they are situated.<sup>32</sup> But congress has now acted on this subject, as may be seen from certain provisions of the river and harbor act of 1890.<sup>33</sup> That law enacts, in its seventh section "that it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, break-water, bulkhead, jetty, or structure of any kind outside established harbor-lines or in any navigable waters of the United States where no harbor-lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway, or other works,

<sup>30</sup> *South Carolina v. Georgia*, 93 U. S. 4.

<sup>31</sup> *Hill v. United States*, 39 Fed. Rep. 172.

<sup>32</sup> *Transportation Co. v. Parkersburg*, 107 U. S. 691, 2 Sup. Ct. Rep. 732.

<sup>33</sup> 26 U. S. St. at Large, 426.

over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any state, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War." And the twelfth section of the same act provides that "where it is made manifest to the Secretary of War that the establishment of harbor-lines is essential to the preservation and protection of harbors, he may and is hereby authorized to cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him."

### § 220. Title of state to bed of stream.

In England, the title to the alveus, or bed, of all navigable streams is vested in the crown. And anciently it was in the power of the king to convey this title to private persons at his mere will and pleasure. But this royal right was abridged by Magna Charta, so that it now requires an act of parliament to convey away this portion of the public domain. To these sovereign rights the several states succeeded upon the establishment of American independence. The shores of navigable waters and the soil under them were not granted by the constitution to the United States, but were reserved to the several states respectively.<sup>34</sup> But the United States has the same right of ownership in the navigable streams of its territories.

<sup>34</sup> Pollard v. Hagan, 3 How. 212.

For if additions are made to the national domain by right of occupancy and discovery, the general government becomes both sovereign and territorial proprietor of all the country so acquired. And if new territory is gained by purchase, it takes all the rights of the ceding sovereign, and is absolute owner of the waterways, except in so far as it is bound to recognize private rights previously vested or is restricted, in this respect, by treaty stipulations. It may therefore be regarded as the settled doctrine of American law that the territorial sovereign, be it the state or the United States, is the owner in fee of the bed of all the navigable streams within its limits.<sup>35</sup>

But in the case of non-tidal rivers, the question of title to the bed of the stream, as between the state and the riparian owner, will depend upon whether the common law doctrine of navigability has been adopted or rejected by that state. By that doctrine, as we have already seen, "navigable streams" are those only in which the tide ebbs and flows.<sup>36</sup> But, as has also been shown, this test has been discarded as inapplicable in a majority of our states, and navigability in law has been made synonymous with navigability in fact. In those states, therefore, the beds of all streams which are in fact navigable for purposes of useful commerce belong to the state, whether the water is salt or fresh, or whether or not it is affected by the rise and fall of the tides.<sup>37</sup>

<sup>35</sup> *Attorney General v. Stevens*, 1 N. J. Eq. 369, 22 Am. Dec. 526; *People v. Canal Appraisers*, 33 N. Y. 461; *Browne v. Kennedy*, 5 Har. & J. 195; *Pitkin v. Olmstead*, 1 Root, 217; *State v. Black River Phosphate Co.*, (Fla.) 9 South. Rep. 205; *St. Louis, I. M. & S. R. Co. v. Ramsey*, 53 Ark. 314, 13 S. W.

Rep. 931; *Green v. Swift*, 47 Cal. 536; *Lamprey v. Metcalf*, (Minn.) 53 N. W. Rep. 1139.

<sup>36</sup> *Supra*, § 216.

<sup>37</sup> *People v. Canal Appraisers*, 33 N. Y. 461; *State v. Black River Phosphate Co.*, (Fla.) 9 South. Rep. 205; *Lamprey v. Metcalf*, (Minn.) 53 N. W. Rep. 1139.

But some few of the states adhere to the rule of the common law, and in them the title of the riparian owner is correspondingly extended. Thus in Illinois, it is held that the Mississippi is not in law a navigable stream; and hence the title of a riparian proprietor whose lands are bounded by that river extends to the middle thread of the stream.<sup>38</sup> In Iowa, on the other hand, the modern rule has been adopted, and it is there held that the bed of the Mississippi, and its banks to high water mark, belong to the state, and that the title of the abutting owner extends only to that line.<sup>39</sup> This difference of doctrine produces some singular results. Thus, that portion of the great river which flows between the two states named is a "navigable water of the United States," is technically navigable on the Iowa side, and is technically non-navigable on the Illinois side; and that half of its bed which lies adjacent to Illinois is owned by private persons, while the other half belongs to the state of Iowa.

But even in those jurisdictions where the common law rule prevails, the title of a riparian owner to the bed of a stream which is actually navigable is not quite so free and unrestricted as his ownership of land under water which is entirely incapable of being used for navigation. For it is subject to a public easement of passage. Thus in New Jersey, while it is said that the state has no *jus privatum* in the soil of the Delaware river above tide-water, yet the right of the riparian owners is subject to the public easement of navigation, and to such regulations of the waters by the legislature as the public right of navigation may require. As to the jurisdiction and power of the state over it, the river above tide-water is to be regarded as if

<sup>38</sup> *Middleton v. Pritchard*, 4 Ill. 510; *Ensminger v. People*, 47 Ill. 384.      <sup>39</sup> *Barney v. Keokuk*, 94 U. S. 324.



it were navigable in law.<sup>40</sup> And in an early case in New York, while it was stated that the riparian owner above tide-water takes to the middle thread of the stream, yet, if the stream is navigable in fact, the public have the right to use the waters as a highway for the passage of boats and vessels, and in conformity with this principle, the legislature may declare certain waters to be public highways, and regulate them in respect to the building of dams and in other similar regards.<sup>41</sup>

### § 221. Limit of riparian owner's estate.

Assuming the particular stream to be navigable,—either because it is tidal or because it is recognized by the local law as having that character,—it next becomes important to determine the dividing line between the property of the state, as owner of the bed of the stream, and the property of the adjoining upland proprietor. This line is fixed, in some states, at low water mark, in others at high water mark. In Pennsylvania, for example, the title of the riparian proprietor extends to low water mark; but in tidal streams, such as the Delaware and the Schuylkill, his title is subject to the public right of passage in vessels when the tide is high.<sup>42</sup> In Massachusetts, by an ancient colonial ordinance, the title of owners of land adjoining all tidal waters extends to low water mark.<sup>43</sup> In West Virginia, the proprietors of lands bounded on the Ohio river own the fee in the lands to low water mark; subject to the

<sup>40</sup> Attorney General v. Delaware & Bound Brook R. Co., 27 N. J. Eq. 1.

<sup>41</sup> Canal Comm'rs v. People, 5 Wend. 423.

<sup>42</sup> Tinicum Fishing Co. v. Carter, 61 Pa. St. 21; Stover v. Jack, 60 Pa. St. 339; Ball v. Slack, 2 Whart. 508. And "low

water mark," as the limit of a riparian owner's title, is the ordinary low water mark unaffected by drought. Stover v. Jack, *supra*.

<sup>43</sup> Tappan v. Boston Water-Power Co., (Mass.) 31 N. E. Rep. 703.

ease of the public in that portion lying between high and low water mark, with a right in the state to control the same, for the purposes of navigation and commerce, without compensation to the owner.<sup>44</sup> In Minnesota, the state holds the title up to low water mark "in its sovereign capacity, in trust for the people, for the purpose chiefly of protecting the rights of navigation."<sup>45</sup> In Michigan, it is said that the ownership of land bordering upon Lake Muskegon carries with it the ownership of the land under the shallow water so far out as it is susceptible of beneficial private use, but subordinate to the paramount public right of navigation and the other public rights incident thereto.<sup>46</sup> On the other hand, in Connecticut, Iowa, and Arkansas, the proprietors of lands bounded on a navigable river own the soil to high water mark and no further.<sup>47</sup> And in Oregon, in the case of the Willamette river, it is ruled that the point to which the water usually rises in an ordinary season of high water is the true meander line, and forms the boundary of the title of the United States or its grantee.<sup>48</sup>

## § 222. Incidents of state's ownership of bed of stream.

The principal consequence of the retention by the state of title to the beds of navigable rivers is that they are perpetually secured in their character as public highways. And the most important right vested in the public, by

<sup>44</sup> *Barre v. Flemings*, 29 W. Va. 314, 1 S. E. Rep. 731; *Brown Oil Co. v. Caldwell*, 35 W. Va. 95, 13 S. E. Rep. 42.

<sup>45</sup> *Miller v. Mendenhall*, 43 Minn. 95, 44 N. W. Rep. 1141.

<sup>46</sup> *Rice v. Ruddiman*, 10 Mich. 125.

<sup>47</sup> *Chapman v. Kimball*, 9

Conn. 38, 21 Am. Dec. 707; *Barney v. Keokuk*, 94 U. S. 324; *St. Louis, I. M. & S. R. Co. v. Ramsey*, 53 Ark. 314, 13 S. W. Rep. 931.

<sup>48</sup> *Johnson v. Knott*, 13 Oreg. 308, 10 Pac. Rep. 418. And see *Moore v. Willamette Transp. Co.*, 7 Oreg. 355.

reason of such ownership on the part of the state, is the right of navigation. Of this right we shall have more to say hereafter. But there are also certain other rights which are free and common to the general public, when the state owns the bed of the stream, from which they would be excluded if the land under water were the private property of the abutting owners. Such is the right to take fish, ice, and the other fruits or products of the waters. In Connecticut, for example, it is ruled that the right to gather sea-weed growing on the bed of a navigable river, below low water mark, belongs to the public, and not exclusively to the riparian proprietor.<sup>49</sup> And in a case in Pennsylvania, where the action was for the value of a lot of paving-stones alleged to belong to the plaintiff and which had been carried away by the defendant, the latter attempted to show that the articles in question were the property of the state, because they had been gathered out of the Delaware river, but it was held not a valid defense.<sup>50</sup> In an English case it was ruled that there is no common law right to bathe in the sea.<sup>51</sup> But this decision has been much criticised, and it is not generally accepted as good law in this country.<sup>52</sup> It must be observed, however, that all these rights of the general public must be exercised without trespassing in any manner upon the rights or the property of the riparian owners.

### § 223. Rivers as boundaries between states.

Where a navigable river flows between two states, the dividing line of their territorial jurisdiction may be co-

<sup>49</sup> *Chapman v. Kimball*, 9 Conn. 38, 21 Am. Dec. 707.

<sup>50</sup> *Solliday v. Johnson*, 38 Pa. St. 380.

<sup>51</sup> *Blundell v. Catterall*, 5 B. & Ald. 268.

<sup>52</sup> See *McManus v. Carmichael*, 3 Iowa, 1; *Hetfield v. Baum*, 13 Ired. 394.

incident either with the middle thread of the stream or with one or other of its banks. This will depend upon the definition of their respective boundaries, as fixed by treaty, organic act, or otherwise. Where a power possesses a river and cedes the territory on the other side of it, making the river the boundary, the rule is that that power retains the river, unless there is an express stipulation for a relinquishment of the rights of soil and jurisdiction over the bed of such river.<sup>53</sup> But generally, in this country, the determination of the limits of interstate jurisdiction is to be made by reference to the acts of congress authorizing the formation of new states. Thus, by the acts of congress providing for the organization and admission of Illinois and Missouri as states of the Union, it was declared that the western boundary of Illinois and the eastern boundary of Missouri should be the "middle of the main channel of the Mississippi river." And in all such cases as this the two states have concurrent general jurisdiction over the river, and each has exclusive territorial jurisdiction over that portion adjacent to its own shore.<sup>54</sup> Thus, the question whether a riparian owner holds the fee to the middle thread of the stream, or only to high or low water mark, is governed by the municipal law of the state where in his land lies, and the two states, on opposite sides of the river, may establish different rules in this respect.<sup>55</sup> But as to the river itself, the authority of each state is limited to the protection of its own shores and harbors, without

<sup>53</sup> Howard v. Ingersoll, 13 How. 381.

<sup>54</sup> City of St. Louis v. Rutz, 138 U. S. 226, 11 Sup. Ct. Rep. 337; Handly v. Anthony, 5 Wheat. 374; Carlisle v. State, 32 Ind. 55; McFall v. Comm., 2 Metc. (Ky.) 394; Blanchard

v. Porter, 11 Ohio, 138; Howard v. Ingersoll, 13 How. 381; Keator Lumber Co. v. St. Croix Boom Co., 72 Wis. 62, 38 N. W. Rep. 529.

<sup>55</sup> City of St. Louis v. Rutz, 138 U. S. 226, 11 Sup. Ct. Rep. 337.

interfering with the opposite shores or the common rights of navigation. And the state has no power or right to inflict injury on the riparian proprietors on the other side of the river, as by erecting dikes or other structures, for the protection of its own shore, but which deflect the current of the river and cause the erosion of the lands of such proprietors.<sup>56</sup>

### § 224. Navigable stream as boundary.

Patents by the United States of land bounded by streams and other waters, in the absence of reservation or restriction of terms, are to be construed, as to their effect, by the law of the state in which the land lies. In Illinois, for instance, the common law being in force, a patentee from the United States of land there situated, bounded by the water of a small lake, takes to the center of the lake.<sup>57</sup> In California it is held that, under a United States patent to lands bordering upon a navigable stream, the grantee, in the absence of an intent appearing in the patent to the contrary, does not acquire title to any land below high water mark.<sup>58</sup> In Oregon and Nevada, it is held that where a stream is meandered in the public surveys, the stream, and not the meander line, forms the true boundary of the riparian proprietor.<sup>59</sup> And where the government leaves a small island in a navigable river, lying between the shore and the middle of the stream, unsurveyed, and sells all the surveyed islands and all the lands on both sides of the river, without any reservation as to such

<sup>56</sup> *Rutz v. City of St. Louis*, 7 Fed. Rep. 438.

<sup>57</sup> *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. Rep. 808.

<sup>58</sup> *Packer v. Bird*, 137 U. S. 661, 11 Sup. Ct. Rep. 210;

*Wright v. Seymour*, 69 Cal. 122, 10 Pac. Rep. 323.

<sup>59</sup> *Weiss v. Oregon Iron Co.*, 13 Oreg. 496, 11 Pac. Rep. 255; *Minto v. Delaney*, 7 Oreg. 337; *Shoemaker v. Hatch*, 13 Nev. 261.

island, the title will be held to have passed to the riparian owner.<sup>60</sup> In Mississippi a grant of land bounded "by" or "on" a fresh-water stream, whether in fact capable of navigation or not, conveys the soil to the middle thread of the stream, including, of course, the shore between high and low water mark.<sup>61</sup> And in Virginia, a conveyance of riparian lands by metes and bounds, which on the river side are substantially co-incident with high water mark, carries all the right of the grantor to the strip lying between high and low water mark.<sup>62</sup> And it is held that where, upon a town plat, the only boundary for part of a street on one side is a navigable lake, the street extends to low water mark.<sup>63</sup>

### § 225. Public right of navigation.

In the case of navigable streams, both the riparian owner and the general public have rights, not necessarily inconsistent, but which must so limit and restrict each other as to secure the due recognition and full enjoyment of all. In the first place, the public have a right of navigating such rivers. And it follows that the riparian owner, even though he may own to low water mark, cannot be allowed to construct piers, wharves, or other structures, in such a manner as materially to interfere with the navigation of the stream. His title to the soil of the shore, or under the water, does not authorize him to obstruct in any way the free use of the river by the public as a highway.<sup>64</sup> And even though he may own both sides of the stream, he cannot construct booms entirely across the stream, since such

<sup>60</sup> *Chandos v. Mack*, 77 Wis. 573, 46 N. W. Rep. 803.

<sup>61</sup> *Steamboat Magnolia v. Marshall*, 39 Miss. 109.

<sup>62</sup> *McDonald v. Whitehurst*, 47 Fed. Rep. 757.

<sup>63</sup> *Village of Wayzata v. Great Northern Ry. Co.*, (Minn.) 52 N. W. Rep. 913.

<sup>64</sup> *Sherlock v. Bainbridge*, 41 Ind. 35.

booms would obstruct navigation.<sup>65</sup> And the right to use a navigable river being a public right and not a private right, the riparian owner cannot maintain an action for an illegal obstruction of navigation which prevents his use of this public right. To entitle him to maintain a private action, the obstruction must constitute an invasion or violation of some private right, as distinguished from the public right which he has of navigating the river in common with the rest of the public.<sup>66</sup> Thus, where the riparian owner had free access to the navigable channel in front of his land, it was held that he could not in his own name, maintain a suit to compel the removal of a bridge over such channel, half a mile from his land, though his boats, in navigating to and from adjacent waters, were obstructed by such bridge.<sup>67</sup> And on similar principles, it is held that a person who has entered into a contract obligating himself to drive logs down a stream navigable for such purposes, knowing that the stream had been and was unlawfully obstructed, and who is hindered and subjected to expense in performing his undertaking, by reason of such impediments, is not entitled to maintain a private action for damages against the person creating such obstructions in the highway.<sup>68</sup>

### § 226. Right of state to improve navigation.

As the state is the owner of the beds of navigable rivers, it does not divest itself of the right and power of improving the navigation thereof. In fact, the state may do everything to secure the full enjoyment of the public right

<sup>65</sup> *Stevens Point Boom Co. v. Reilly*, 46 Wis. 237, 49 N. W. Rep. 978.

<sup>66</sup> *Swanson v. Mississippi & R. R. Boom Co.*, 42 Minn. 532, 44 N. W. Rep. 986.

<sup>67</sup> *Whitehead v. Jessup*, 53 Fed. Rep. 707.

<sup>68</sup> *Brennan v. Lammers*, (Minn.) 48 N. W. Rep. 766.

of navigation not inconsistent with the constitutional principle that private property shall not be taken for public use without just compensation.<sup>69</sup> And remote and consequential damages, such as the diminution of water-power, accruing to land from improvements to the navigation of the waterways of a state authorized by the legislature thereof, do not amount to a "taking" within the meaning of the constitution, and the legislature is empowered to authorize such improvements without reference to such consequential damage to land within the state. But the legislature has no power to cause such damage to the owners of land in other states.<sup>70</sup> Hence riparian owners on a navigable stream cannot recover damages for a diversion of the waters by the state, or by a corporation acting by authority of the state, for the improvement of navigation.<sup>71</sup> And in this respect the general government has equal rights and powers, so far as concerns "navigable waters of the United States." Thus for example, the Savannah river being such a stream, the rights of the owner of an adjoining rice field, in the ebb and flow of the tide, are subordinate to the control of the government, for purposes of navigation; and it having determined that the current shall be confined, for the purpose of scouring and deepening the channel, an injury resulting from an elevation of the flow of the tide, which interferes with the drainage of the rice field, is *damnum absque injuria*.<sup>72</sup> At the same time, this right of the state must not be exercised in such a manner as to cause any more damage to the riparian owners than is unavoidable. Thus, in Louisiana,

<sup>69</sup> *Hollister v. Union Co.*, 9 Conn. 436.

<sup>70</sup> *Holyoke Water-Power Co. v. Connecticut River Co.*, 20 Fed. Rep. 71.

<sup>71</sup> *Black River Imp. Co. v. La Crosse Boom Co.*, 54 Wis. 659, 11 N. W. Rep. 443.

<sup>72</sup> *Mills v. United States*, 46 Fed. Rep. 738.



the levee commissioners are authorized to lay off the levees at a suitable distance from the bank of the Mississippi. Yet they have not an arbitrary discretion. And if they should wantonly and unnecessarily set the levee so far back as to ruin the property of a riparian owner, it is said that he would not be without a remedy.<sup>73</sup>

### § 227. Public right of floating logs.

Closely analogous to the public right of navigation on streams which are adapted to be so used is the public right of using "floatable" streams for the purpose of driving logs to the mills or to market. Here, as there, the rights of the public and of the riparian proprietor co-exist, and each must be exercised with a due regard to the existence and preservation of the other. On the one hand, it is not the privilege of the riparian owner to make such use of the stream or of its banks or channel as materially to obstruct the public right of floatage. But yet this public right is not paramount, in any such sense that he may not make any proper use of the stream not substantially inconsistent with it. Thus, under a statute which makes it unlawful for any person to obstruct any navigable stream in any manner so as to obstruct the free navigation thereof, it is held that a dam which interferes with the passage of logs is not an unlawful obstruction unless it materially impairs the value of the stream for floating purposes.<sup>74</sup> And in

<sup>73</sup> *Dubose v. Levee Comm'rs*, 11 La. Ann. 165.

<sup>74</sup> *Conn Co. v. Little Suamico Lumber Co.*, 74 Wis. 652, 43 N. W. Rep. 660. In this case the learned court observed: "It is obvious that it not every obstruction placed in a navigable stream which is a nuisance. A distinction may well be made

between those streams which are capable of floating logs and timber only at certain periods, and then for a few days, in times of freshet, and streams which are capable of more extended and constant navigation. It seems to us that in reason and common justice a distinction should be made in view of

Maine we have a ruling to the effect that a mill-owner on a floatable stream is under no legal obligation to provide

riparian rights. For if the right of floatage is paramount, so that no bridge or dam or other obstruction can be placed in or over the stream by the riparian owner, his use and enjoyment of his property are unnecessarily abridged and restricted. Suppose the riparian proprietor owns the land on both sides of the stream, and there is a water-power which can be utilized and made valuable by means of a dam, can he not construct such dam, and utilize his power, providing he makes a reasonable provision for the passage of logs through his dam? Can he not build a bridge over the stream for the convenient passage from one part of his land to the other? The owner must not so obstruct the stream as to materially impair its usefulness for the purpose of navigation; but, if it only can be used for floating logs and timber, the riparian owner is bound not to obstruct its reasonable use for that purpose. The rights of the riparian owner and of the public are both to be enjoyed with due regard to the existence and preservation of the other. The right of floatage of logs is not paramount in the sense that the using of the water by the riparian owner for machinery is unlawful, so long as he does not materially or unreasonably interfere with the public right, (*Morgan v. King*, 18 Barb. 277; *Gould, Waters*, § 110; *Harrington v. Edwards*, 17 Wis. 586;)

but he may use the stream and its banks for every purpose not inconsistent with the public use. Section 1598 seems to go on some such principle. It provides that every person who shall obstruct any navigable stream in any manner, so as to impair the free navigation thereof, or place in such stream, or any tributary thereof, any substance whatsoever, so that the same may float in or into, and obstruct, any such stream, or impede its free navigation, or construct or maintain, or aid in the construction or maintenance of, any boom not authorized by law in any such navigable stream, shall be liable to a penalty, etc. This plainly implies that an obstruction in a navigable stream which does not impair the free navigation thereof, though not authorized by law, is not a nuisance and unlawful. Dams, booms, mills, and bridges, even, may be constructed on some navigable streams in such a manner as not to seriously affect the navigation thereof, or infringe upon the common right. To say, therefore, that there can be no obstruction or impediment whatsoever by the riparian owner in the use of the stream or its banks, would be in many cases to deny all valuable enjoyment of his property so situated. There may be, and there must be, allowed of that which is common to all a reasonable use. \* \* \* There may be a diminution in quan-

a public way for the passage of logs over his dam, better than would be afforded by the natural condition of the river unobstructed by his mills. The right of the public is to the utilization of the natural flow of the river or its equivalent. And the mill-owner is not obliged to furnish any public passage for logs over his dam or through his mills, at a time when the river at such place, in its natural condition, does not contain water enough to be floatable if unobstructed by mills, although the stream is generally of a floatable character.<sup>75</sup>

On the other hand, the public easement on floatable streams must not be used to the substantial and permanent detriment of the riparian owners. Hence where the facts show that a stream is not navigable for floating logs without doing irreparable injury to the estate through which it flows, and defendant claims a right to use such stream, for that purpose, not only for himself, but for the public, and threatens to commit and claims the right to repeat the numerous trespasses which the exercise of such right necessarily involves, it is held that the plaintiff is entitled to an injunction.<sup>76</sup> But it is said that a corporation, authorized by its charter to maintain dams and make all other improvements required to facilitate the driving of logs on a navigable river, may be bound to prevent the forming of jams which increase the danger of injury to the shores, if it is practicable to do so by reasonable means; but when a jam is reasonably necessary and proper to facilitate the

tity, or a retardation or acceleration of the natural current, indispensable for the general and valuable use of the water, perfectly consistent with the existence of the common right. The diminution, retardation, or acceleration not positively and sensibly injurious by diminish-

ing the value of the common right is an implied element in the right of using the stream at all.' Story, J., in *Tyler v. Wilkinson*, 4 Mason, 397."

<sup>75</sup> *Pearson v. Rolfe*, 76 Me. 380.

<sup>76</sup> *Haines v. Hall*, 17 Oreg. 165, 20 Pac. Rep. 831.

driving of logs, the corporation is not bound to remove it, and is not liable for damages resulting therefrom to a riparian owner. Nor is the corporation bound to erect booms or other structures along the shore to prevent it from washing away, or to station men along the bank to prevent logs from striking it.<sup>77</sup>

### § 228. Public use of banks of stream.

While the waters of a navigable stream remain subject to the public easement of passage, it is now the generally accepted rule of American and English law that the banks of the river, when held in private ownership, are not subject to any servitude, for the benefit of the public, for purposes incidental to navigation. The history and development of this doctrine have been well described by the learned Chancellor Kent, in a passage from which we quote as follows: "The right of way, as to a foot or tow path along the banks of navigable rivers, has been a subject of great discussion, and of much regulation in the laws of different nations. In the civil law, the banks of public rivers and the seashore were held to be public. *Riparum usus publicus est; littorum quoque usus est publicus jure gentium.*<sup>78</sup> The law of nations was here used for natural right, and not international law in the modern sense of it; and it is stated in the Institutes of Justinian that all persons have the same liberty to bring their vessels to land, and to fasten ropes to the banks of the river, as they have to navigate the river itself. These liberal doctrines of the Roman law have been introduced into the jurisprudence of those nations of Europe which have followed the civil and made it essentially their municipal law. Thus in Spain, the seashore is common to the public, and any one

<sup>77</sup> *Field v. Apple River Co.*, 67 Wis. 569, 31 N. W. Rep. 17.      <sup>78</sup> Citing Inst. 2, 1, 4, 5. And see Washb. Easem. 245.

may fish and erect a cottage for shelter. The banks of navigable rivers may also be used to assist navigation. In the French law, navigable or floatable rivers, as they are termed, have always been regarded as dependencies of the public domain, and the lands on each side subject to the servitude or burden of towing paths for the benefit of the public. The English law was anciently the same as the Roman law, if we may judge from the authority of Bracton, who cites the words of the civil law, declaring the banks of navigable rivers to be as much for public use as the rivers themselves. So Lord Holt held that every man, of common right, was justified in going with horses on the banks of navigable rivers for towing.<sup>79</sup> But Sir Matthew Hale, in his treatise *De Jure Maris*, in which he has exhausted the learning concerning public property in the sea and rivers, and collected all the law on the subject, concluded that individuals had a right to a tow-path, for towing vessels up and down rivers, on making a reasonable compensation to the owner of the land for the damage. This condition, which he annexes to the privilege, shows that in his opinion there was no such common right in the English law, inasmuch as it depended on private agreement with the owner of the soil. The point remained in this state of uncertainty until the case of *Ball v. Herbert*,<sup>80</sup> in 1789, brought the whole doctrine into discussion. The case was respecting a claim to tow on the banks of the river Ouze, in Norfolkshire, with men and horses, whenever it was necessary for the purposes of navigation, doing as little

<sup>79</sup> And see Anonymous, 1 Camp. 517, note, where Wood, B., said: "A navigable river is a public highway, and all persons have a right to come there in ships, and to unload, moor, and stay there as long as they

please. Nevertheless if they abuse that right so as to work a private injury, they are liable to an action. The question will therefore be whether the defendant has abused his right."

<sup>80</sup> 3 Term, 253.

damage as possible. It was admitted that the Ouze was a navigable river where the tide ebbed and flowed. The question was whether, at common law, the public had a right to tow vessels on the banks of either side of a navigable river, and it was investigated and argued with great ability. All the cases bearing on the question were collected and reviewed, and the court concluded that there was not, and never had been, any right at common law for the public to tow on the banks of navigable rivers. The claim was directly contrary to common experience; and it was observed by Lord Kenyon that the navigators on the Thames were frequently obliged, at several places, to pass from one side of the river to the other, with great inconvenience and delay, because they had no such general right. It was admitted that on many navigable rivers there was a custom to tow on the banks, but the privilege in those cases rested on the special custom, and not on any common law right. The statutes which have given a right of towing on parts of the Severn, Trent, and Thames, are evidence that no such general right before existed.”<sup>81</sup>

It is true that in some parts of our country, where the civil law has been largely influential in shaping the local jurisprudence, the rule of that law, on this point, is still in force. Thus in Louisiana, it is said that the proprietor of the soil adjacent to the river has no right to appropriate to his exclusive use the banks of a navigable water-course, because he has no property in the use thereof; it belongs to the public.<sup>82</sup> But in a majority of the states, following the modern English rule, it is now definitely held that the public right of passage over the navigable streams does not include a right to use the banks; that navigators have no common right to avail themselves of the banks as

<sup>81</sup> 3 Kent, Comm. 425.

La. Ann. 614, 7 South. Rep.

<sup>82</sup> Sweeney v. Shakespeare, 42 729.

a towing-path, or to land or moor their vessels thereon, or to receive or discharge freight or passengers on the banks, or to approach the stream over the adjacent land, or even to land themselves (except perhaps under stress of peril or necessity), without the permission or consent of the riparian owner, or unless such a right has been acquired by a grant or prescription; and that any such unauthorized use of the banks will expose them to the liability of trespassers.<sup>83</sup> So if the riparian owner has constructed a wharf, it is his private property and cannot be used by the public without his consent. "By the common law, except in case of danger or necessity, no one has a right to land goods upon the private property of another on the shore of a navigable river."<sup>84</sup> The same principles apply to the case of floatable streams. The right to float logs down a stream does not confer a right to run them upon the adjacent land, or to travel upon the banks, or to cause the water to overflow the banks to the injury of the shore-owner, and it is immaterial whether an injury so occurring arises from the negligence of the party or otherwise.<sup>85</sup> But where the riparian owner has only a qualified interest in the shore below the line of high water mark, it is held that tying a float of logs to a tree standing below high water mark, and driving a team along the water's edge below high water mark, for the purpose of floating the logs, is a proper use of a navigable stream and not a trespass on the land.<sup>86</sup> But still, even under these circumstances, where the owner of vessels places them between

<sup>83</sup> *Ledyard v. Ten Eyck*, 36 Barb. 102; *Ensminger v. People*, 47 Ill. 384; *Bainbridge v. Sherlock*, 29 Ind. 364; *Talbott v. Grace*, 30 Ind. 389; *Steamboat Magnolia v. Marshall*, 39 Miss. 109.

<sup>84</sup> *O'Neill v. Annett*, 27 N. J. Law, 290.

<sup>85</sup> *Haines v. Welch*, 14 Oreg. 319, 12 Pac. Rep. 502; *Hooper v. Hobson*, 57 Me. 273.

<sup>86</sup> *Pursell v. Stover*, (Pa.) 20 Atl. Rep. 403.

high and low water mark in front of the property of another person, and keeps them there for an unreasonable time, making a profit out of such use of the landowner's property, he is liable in damages for such use, since it is not an incident to the right of navigation.<sup>87</sup>

But in some states it has been attempted to accommodate the often conflicting rights of the shore-owner and the navigator, by according to the latter such rights, in respect to the use of the banks, as are necessary for the purposes of navigation. We find this doctrine expounded by the supreme court of Oregon in the following terms: "How far may one who has an undoubted right to navigate the stream meddle with or touch upon the bank of the stream, which is private property? Whatever he has is founded upon necessity. If he has a right to meddle with the bank, it is only an incidental one. Although the riparian owner has an absolute right to enjoy his land in all proper ways, the adverse party has an absolute right, as one of the public, to navigate the stream. Neither one can justly deprive the other of his rights. If the riparian owner could deny the navigator the right to come to land, in a case where the business of navigating could not be performed without the privilege of landing, he could deny all use of the stream. . . . While it is beyond question that the riparian owner is entitled to be protected from any unnecessary intrusion upon his premises, it is equally certain that he cannot, solely for the maintenance of an abstract right, or an exclusive possession, deny to the public the right of navigation. He takes his title subject to this right vested in the public."<sup>88</sup>

<sup>87</sup> Wall v. Pittsburgh Harbor Co., (Pa.) 25 Atl. Rep. 647.

<sup>88</sup> Weise v. Smith, 3 Oreg. 445.



## § 229. Rights of riparian owner in general.

The rights of a riparian owner on a navigable stream are substantially the same as those enjoyed by a proprietor bounding on a non-navigable stream, which have heretofore been examined and explained,<sup>89</sup> except that in some respects such rights are enlarged by the greater size and capacity of the stream, and that he is in the enjoyment of some additional privileges directly connected with its navigable character. "The distinction between tide waters and fresh, or between public and private waters, is not necessarily a material consideration in determining questions relating to riparian rights, since riparian rights proper depend upon the ownership of land contiguous to the water, and are the same whether the proprietor of such land owns the soil under the water or not."<sup>90</sup> A general summary of these riparian rights was given in a decision of the United States supreme court, which has been widely quoted, and which is now recognized as the leading authority on the question. Speaking of the shore-owner, Mr. Justice Miller said: "He is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, and the right to make a landing, wharf, or pier, for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. . . . This riparian right is property and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accord-

<sup>89</sup> Supra, §§ 134-159.<sup>90</sup> Gould, Waters, § 148.

ance with established law, and, if necessary that it be taken for the public good, upon due compensation.”<sup>91</sup> And further, riparian rights on navigable streams cannot be destroyed or materially impaired, by the state, in the construction of works of public improvement, without compensation made.<sup>92</sup> It is held that the riparian owner may use the water flowing past his land for any purpose he pleases, so long as he does not impede navigation.<sup>93</sup> And it follows that no private person can complain of the use to which he puts the water or the amount he takes, provided the public right of navigation is not impaired. Also the riparian owners may alter the channel of a stream by constructing dams and flumes, and diverting the water for manufacturing purposes, so far as such changes are possible without an infringement of the public right to such a free way as would be afforded by the river in its natural condition.<sup>94</sup> And conversely, in a case in Oregon, where it concerned a small fresh-water stream, which was navigable for small boats and floating logs only a part of the year, it was held that the riparian owner was entitled to the aid of equity to prevent a diversion of the waters from their natural channel, and this notwithstanding that he did not himself use the water-power and had sustained but small pecuniary damage.<sup>95</sup> The riparian proprietor has also a right to protect his land from a threatened change in the

<sup>91</sup> *Yates v. Milwaukee*, 10 Wall. 497. See, also, *Potomac Steamboat Co. v. Upper Pot. S. Co.*, 109 U. S. 672, 3 Sup. Ct. Rep. 445, and 4 Sup. Ct. Rep. 15; *Bowman v. Wathen*, 2 McLean, 376; *Delaplaine v. Chicago & N. W. R. Co.*, 42 Wis. 214; *Parker v. West Coast Packing Co.*, 17 Oreg. 510, 21 Pac. Rep. 822.

<sup>92</sup> *Hollingsworth v. Parish of Tensas*, 17 Fed. Rep. 109. See *supra*, § 226.

<sup>93</sup> *Morrill v. St. Anthony Falls Water-Power Co.*, 26 Minn. 222, 2 N. W. Rep. 842.

<sup>94</sup> *Connecticut River Lumber Co. v. Olcott Falls Co.*, (N. H.) 21 Atl. Rep. 1090.

<sup>95</sup> *Weiss v. Oregon Iron Co.*, 13 Oreg. 496, 11 Pac. Rep. 255.

channel of the stream by erecting along the border thereof a bulkhead as high as the original bank of the stream.<sup>96</sup> It is held that the person entitled to the exclusive right to possess and use land abutting on a navigable stream, is also entitled to enjoy the riparian rights incident to the land, though he does not own the fee.<sup>97</sup> As to the exact nature and extent of riparian rights on navigable streams, these may vary according to the legislation of the several states. The federal courts declare that the incidents or rights which attach to the ownership of property conveyed by the United States bordering on navigable streams, will be determined by the states in which the lands are situated, subject only to the limitation that their rules do not impair the efficacy of the grant or the use and enjoyment of the property by the grantee.<sup>98</sup> Many of the specific rights of a riparian owner on a navigable stream are substantially identical with those enjoyed by an owner bounding on the seashore, and may therefore be more fully discussed under the general head of "littoral rights." The particular questions relating to the right of access to the water, fisheries, alluvion, etc., will be found treated in the succeeding chapter.

### § 230. Right to build wharves and landings.

In those states where, by the local law, the line of a riparian owner on a navigable stream extends to low water mark, it is held that the owner, being thus invested with title to the shore, and having the right to the exclusive use thereof, has also the right (unless restrained by law

<sup>96</sup> *Barnes v. Marshall*, 68 Cal. 569, 10 Pac. Rep. 115.

<sup>98</sup> *Packer v. Bird*, 137 U. S. 661, 11 Sup. Ct. Rep. 210; *St.*

<sup>97</sup> *Hanford v. St. Paul & D. Louis v. Myers*, 113 U. S. 566, 5 R. Co., 43 Minn. 104, 42 N. W. Sup. Ct. Rep. 640.  
Rep. 596.

or ordinance) to establish a private wharf or landing thereon, and make reasonable charges for its use by those navigating the river.<sup>99</sup> And the United States supreme court holds that riparian proprietors on streams navigable in fact have the same right to construct suitable landings and wharves, for the convenience of commerce and navigation, as riparian proprietors on navigable waters affected by the ebb and flow of the tide.<sup>100</sup> In Wisconsin, the rule is that the riparian owner has the right to construct, in shoal water in front of his land, proper wharves and piers in aid of navigation, and, at his peril of obstructing navigation, through the water far enough to reach actually navigable water.<sup>101</sup> In Iowa, the riparian proprietor of land situated outside of an incorporated town or city has a right to erect private wharves or landings on the shores, if they conform to the state regulations (if any) and do not obstruct the paramount right of navigation; but wharves erected within the corporate limits of any town or city must yield to the paramount right of the corporation, when granted by the law by which the corporation is created.<sup>102</sup> On similar principles, it is held that those owning lands along floatable streams may lawfully, until prohibited by statute, construct in front of their land proper booms to aid in floating logs, but not so as to violate any public law or obstruct the navigation of the river by any method in which it may be used, or infringe upon the rights of other

<sup>99</sup> *Ensminger v. People*, 47 Ill. 384; *Chicago v. Laffin*, 49 Ill. 172; *Bainbridge v. Sherlock*, 29 Ind. 364; *East Haven v. Hemingway*, 7 Conn. 186; *Ryan v. Brown*, 18 Mich. 196; *Fry v. Campbell's Creek Coal Co.*, (W. Va.) 16 S. E. Rep. 796; *Bond v. Wool*, 107 N. Car. 139, 12 S. E. Rep. 281.

<sup>100</sup> *Railroad Co. v. Schurmeier*, 7 Wall. 272.

<sup>101</sup> *Diedrich v. Northwestern R. Co.*, 42 Wis. 248; *Cohn v. Wausau Boom Co.*, 47 Wis. 314, 2 N. W. Rep. 546.

<sup>102</sup> *Grant v. City of Davenport*, 18 Iowa, 179.

riparian owners.<sup>103</sup> On the other hand, in Pennsylvania, it is held that a riparian owner on the Delaware has no right to make any erection between high and low water mark without express authority from the state.<sup>104</sup> And in *Atlee v. Packet Co.*,<sup>105</sup> it was said that a pier erected in the navigable water of the Mississippi river, for the sole use of the riparian owner, as part of a boom for logs, without license or authority of any kind, except such as may arise from his ownership of the adjacent shore, is an unlawful structure. Such a structure, it was said, differs very materially from wharves and other like constructions made to aid and facilitate navigation, and generally regulated by city or town ordinances, or by statutes of the state, or other competent authority.

### § 231. Right to reclaim submerged lands.

In the state of Minnesota, it is held that the owner of land bounded on a navigable stream has the right, by virtue of his ownership of the bank, to enjoy free communication between his abutting premises and the navigable channel of the river, and may fill out into the river, beyond low water mark, to navigable water, so as to make the shore available for the uses connected with navigation, and to this extent he is entitled to the exclusive occupancy of the bed of the stream, subordinate and subject only to the rights of the public with respect to navigation, and such needful rules and regulations for their protection as may be prescribed by competent legislative authority; and such riparian rights are property, and cannot lawfully be taken for public use without just compensation.<sup>106</sup> And

<sup>103</sup> *Stevens Point Boom Co. v. Reilly*, 44 Wis. 295.

<sup>104</sup> *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21.

<sup>105</sup> 21 Wall. 389.

<sup>106</sup> *Carli v. Stillwater Street Ry. Co.*, 28 Minn. 373, 10 N. W. Rep. 205; *Brisbine v. St. Paul & S. C. R. Co.*, 23 Minn. 114.

also it is held, in the same state, that this right to reclaim and occupy the submerged lands out to the point of navigability, though originally incident to the riparian estate, may be separated therefrom, and be transferred to and enjoyed by persons having no interest in the original riparian estate.<sup>107</sup> But inasmuch as the title to the bed of the stream is in the state, and the actual proprietary interest of the riparian owner extends to low water mark at the furthest, it is evident that such a right to fill in and occupy to the point of navigability must rest upon an implied license from the state. It is accordingly held, in the state to which we have referred, that the establishment by legislative authority of a harbor or dock line in navigable waters is an implied grant to the owners of the adjacent upland of the right to occupy the land between low water mark and such line, title to which is in the state, and to build on or fill up the same so as to extend the upland to such dock line.<sup>108</sup> And the same doctrine is recognized in Rhode Island and perhaps some other states.<sup>109</sup> In New Jersey, although the title of the riparian owner on navigable water extends only to high water mark, it is held, in virtue of a local custom now having the force of established law, that the adjacency of the land of such an owner to the stream invests him with a license to fill in and dock out on the public domain in front of his land to such an extent as does not interfere with public rights, and this license, when executed, becomes irrevocable.<sup>110</sup> So also in Mary-

<sup>107</sup> *Hanford v. St. Paul & D. R. Co.*, 43 Minn. 104, 44 N. W. Rep. 1144.

<sup>108</sup> *Miller v. Mendenhall*, 43 Minn. 95, 44 N. W. Rep. 1141.

<sup>109</sup> *Aborn v. Smith*, 12 R. I. 373; *Engs v. Peckham*, 11 R. I. 223; *Gerhard v. Comm'rs*, 15

R. I. 334, 5 Atl. Rep. 199; *Norfolk v. Cooke*, 27 Gratt. 438; *Guy v. Hermance*, 5 Cal. 74; *Eldridge v. Cowell*, 4 Cal. 80.

<sup>110</sup> *New Jersey Zinc Co. v. Morris Canal Co.*, 44 N. J. Eq. 398, 15 Atl. Rep. 227.

land, under the act of 1796, conferring on lot-owners in the city of Baltimore fronting on the water the right to make improvements in the water, it is held that such owners, while not having a technical fee in the submerged land, are entitled to the franchise and a perpetual use of the land for the purpose of erecting and keeping up the improvements.<sup>111</sup>

But on the other hand, in some states, great stress being laid upon the state's ownership of the land under navigable waters, it is denied that the riparian owner has any right or license, positive or implied, to reclaim or occupy below the line which marks the limit of his estate in fee. And as a consequence of this doctrine it is held that if land is made by a stranger, by filling in earth in front of the estate of a riparian owner, from low water mark into the stream, and wharves and docks are built thereon, the riparian owner cannot maintain ejectment for such property.<sup>112</sup> And in New York it is said that where one, without right, enters on and fills up land under navigable water, thereby raising it above the water, he acquires no title to such land, and is not an "adjacent owner" under the statute giving to such owners a preferential right to purchase the flats.<sup>113</sup>

### § 232. Preferential right to purchase.

In some states, as in New York, it is provided by statute that lands under the navigable waters may not be granted by the state "to any person other than the proprietor of the adjacent lands." And this, it is held, refers to the proprietors of the adjacent uplands.<sup>114</sup> Where a riparian

<sup>111</sup> *Horner v. Pleasants*, 66 Md. 475, 7 Atl. Rep. 691. Office, (N. Y.) 32 N. E. Rep. 139.

<sup>112</sup> *Austin v. Rutland R. Co.*, 45 Vt. 215. <sup>114</sup> *Rumsey v. New York & N. E. R. Co.*, 114 N. Y. 423, 21 N. E. Rep. 1066.

<sup>113</sup> *People v. Comm'rs of Land*

owner conveys his land, he cannot reserve any right to the adjacent land under the water, of which he has received no grant from the state, but the grantee becomes the riparian owner, and as such is entitled to apply to the state for a grant of the land under the water.<sup>115</sup> But the conveyance of land for a railroad right of way, partly above and partly below high water, along the bank of a river, by one owning the adjacent uplands, does not destroy the grantor's character as riparian owner so that a patent may not issue to him, as the owner of adjacent land, for the land lying next under the water.<sup>116</sup> In North Carolina, the code excepts from entry lands covered by navigable streams, but with a proviso "that persons owning lands on any navigable sound, river, creek, or arm of the sea, may, for the purpose of erecting wharves on the side of the deep water thereof, next to their own land, make entries of the land covered by water adjacent to their own, as far as the deep water, and obtain title as in other cases." And it is held that this was not intended to wrest from the riparian owner any rights he already had, but only to allow him to acquire an absolute instead of a qualified property.<sup>117</sup>

<sup>115</sup> *Blackslee Manuf. Co. v. Aldridge*, (N. Y.) 32 N. E. Rep. 50.  
*Blackslee Iron Works*, (N. Y.) 50.  
29 N. E. Rep. 2.

<sup>117</sup> *Bond v. Wool*, 107 N. Car.

<sup>116</sup> *New York Cent. R. Co. v.* 139, 12 S. E. Rep. 281.



**CHAPTER XIV.****LITTORAL RIGHTS.**

[By the Editor.]

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- 234. Meaning of the terms "shore" and "beach."
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**§ 233. "Tide-lands" defined.**

The term "tide-lands," which is now constantly and familiarly used on the Pacific coast, is not a technical term of the common law. It appears to have been first employed in a statute of California, enacted in 1861, entitled "An act to provide for the sale of marsh and tide lands of this state." But its precise meaning has been fixed by the courts with very little difficulty or difference of opinion. It means such lands as are periodically cov-

ered and uncovered by the rise and fall of the ordinary tides on the sea-coast or in a bay, estuary, or arm of the sea. It is never understood as including any land which is permanently submerged by the waters of the ocean or the bay.<sup>1</sup> The term has been adopted, in legislative and judicial use, in Oregon and Washington, where it bears precisely the same meaning. Thus, in the former of those states, it is said that the phrase "tide-lands" applies to lands covered and uncovered by the ordinary tides, which the state owns by virtue of its sovereignty, and thus corresponds with the shore or beach, which at common law is that land lying between ordinary high and low water mark. It must be such land as is alternately covered and left dry by the ordinary flux and reflux of the tides. Lands adjacent to navigable waters, where the tide flows and reflows, come within the description. But it cannot be said to apply to lands which are covered with water the greater part of the year.<sup>2</sup> So it is ruled that an isolated sand-bank, alternately covered and exposed by the tides, which is situated in the Columbia river a mile from the Oregon shore, and entirely disconnected from the main land, is not "tide-land," within the proper meaning of that term.<sup>3</sup>

### § 234. Meaning of the terms "shore" and "beach."

These two synonymous terms are frequently employed in legislative and judicial language, as well as in conveyances between individuals where the sea is intended to be given as a boundary. Their meaning is now clear and well fixed. By the civil law (and the modified form of it in

<sup>1</sup> People v. Davidson, 30 Cal. 379; Rondell v. Fay, 32 Cal. 354; Walker v. State Harbor Comm'rs, 17 Wall. 648; Walker v. Marks, 2 Sawy. 152.

<sup>2</sup> Andrus v. Knott, 12 Oreg. 501, 8 Pac. Rep. 763.

<sup>3</sup> Elliott v. Stewart, 15 Oreg. 259, 14 Pac. Rep. 416.

force in Louisiana), the shore of a sea or bay extends as far up as the line marked by the highest tide in winter.<sup>4</sup> But by the common law the dividing line between upland and shore is marked by the advance of the ordinary flood tide; that is, it does not extend as far up as the line reached by the waters under the stress of storms or at the period of the spring tides. Thus, in an early Massachusetts decision it was said: "The seashore must be understood to be the margin of the sea in its usual and ordinary state. Thus when the tide is out, low water mark is the margin of the sea, and when the sea is full, the margin is high water mark. The seashore is therefore all the ground between the ordinary high water mark and low water mark. It cannot be considered as including any ground always covered by the sea, for then it would have no definite limit on the seaboard. Neither can it include any part of the upland, for the same reason. This definition of the seashore seems to result necessarily from its nature and situation."<sup>5</sup> As for the term "beach," it is considered by the courts as the exact equivalent of "shore." Thus it is said that this word, "in its ordinary signification, when applied to a place on tide-waters, means the space between ordinary high and low water mark, or the space over which the tide usually ebbs and flows. It is a term not more significant of a sea margin than 'shore;' and 'bounding on the shore' does not include the shore." Whence the court concluded that "bounded westerly by the beach" would not include the land between high and low water mark.<sup>6</sup>

<sup>4</sup> *City of Galveston v. Me-  
nard*, 23 Tex. 349; Civil Code  
La., art. 451.

<sup>5</sup> *Storer v. Freeman*, 6 Mass.  
435. See, also, *Providence  
Steam Engine Co. v. Provi-*

*dence & S. Steamship Co.*, 12  
R. I. 348.

<sup>6</sup> *Niles v. Patch*, 13 Gray, 254.  
See, also, *Doane v. Willcutt*, 5  
Gray, 355; *Hodge v. Boothby*,  
48 Me. 68.

**§ 235. High and low water mark.**

"High water mark," as the term is used with reference to boundaries on tidal waters, means the line to which the waters advance at the flood of an ordinary or usual high tide. That is, it excludes on the one hand the line of the periodical extraordinary tides or that marked by the furthest reach of the waters in storms, and on the other hand the line marked by the periodical lowest tides at their flood. In other words, high water mark is determined by the reach of the medium high tide between the spring and the neap tides. On this definition the authorities are very generally agreed.<sup>7</sup> But there is a decision in California to the effect that by the designation "usual" or "ordinary high water mark," as applied to tide waters, is meant the limit reached by the neap tides.<sup>8</sup> This, it will be perceived,—if the court chose its language with scientific precision,—would give the upland proprietor the benefit of the strip between the mark of the medium flood tide and that of the neap tide, which is not usually accorded to him. But if this is the meaning of the decision, it is not borne out by the weight of authority. In regard to the term "low water mark," it is defined by the same authorities, as the line marked by the lowest ebb of an ordinary or usual tide. It corresponds with the legal meaning of "high water mark" in rejecting the extraordinary flux and reflux of the water, and in being determined by the reach of the medium or average tide.

<sup>7</sup> *New Jersey Zinc Co. v. Mor-*  
*ris Canal Co.*, 44 N. J. Eq. 398,  
15 Atl. Rep. 227; *Howard v.*  
*Ingersoll*, 13 How. 423; *Ger-*  
*rish v. Proprietors*, 26 Me. 395;

*Stover v. Jack*, 60 Pa. St. 539;  
*City of Galveston v. Menard*,  
23 Tex. 349.

<sup>8</sup> *Teschemacher v. Thompson*,  
18 Cal. 11.

**§ 236. Seashore as a boundary.**

It is a general rule that a grant of lands bounded by navigable tide-water carries no title to land below high water mark.<sup>9</sup> But still, a deed will be understood to convey the land to low water mark, when that construction is necessary to make the distances and acreage agree with the deed.<sup>10</sup> Thus, calls in a deed which describe a parcel of land on the seashore as running "to the water and thence by the water," will be held to carry the grant to low water mark.<sup>11</sup> And it is said that the word "adjoining," in the description of premises conveyed, means "next to " or "in contact with," and excludes the idea of any intervening space. Hence the description of the premises granted as "adjoining the Atlantic ocean," with the additional words "bounded on the ocean," carries title to the line of ordinary high water, with all the incidents of riparian ownership upon tidal waters.<sup>12</sup> Where a street of a city is bounded on one side by one of the Great Lakes, the owner of the block on the other side takes only to the center of the street, while the fee of the half bounded by the lake remains in the original proprietor, subject to the public easement.<sup>13</sup> In a case in Minnesota, where it appeared that the owner of land abutting on Lake Superior platted it, together with the shallows beyond the shore, and sold blocks with reference to the plat, it was held that the gradual encroachment of the water on one of the shore blocks, so as to entirely submerge it, did not vest the title thereto in the owner of the adjacent inland block.<sup>14</sup>

<sup>9</sup> *De Lancey v. Piepgras*, 17 N. Y. Supp. 681.

<sup>10</sup> *Oakes v. De Lancey*, (N. Y.) 30 N. E. Rep. 974.

<sup>11</sup> *Babson v. Tainter*, 79 Me. 368, 10 Atl. Rep. 63; *Snow v.*

*Mt. Desert Real Estate Co.*, 84 Me. 14, 24 Atl. Rep. 429.

<sup>12</sup> *Yard v. Ocean Beach Asso.*, (N. J.) 24 Atl. Rep. 729.

<sup>13</sup> *Banks v. Ogden*, 2 Wall. 57.

<sup>14</sup> *Gilbert v. Eldridge*, 47 Minn. 210, 49 N. W. Rep. 679.

**§ 237. Title of United States to tide-lands of territory.**

While any portion of the United States remains under the territorial form of government, the title to its tide-lands is in the United States, except in so far as portions of the same may have been already granted to private owners. This is not disputed. But a question has been made as to the nature of the title thus held by the United States, and particularly as to the power and right of the general government to make private grants of such lands. Two decisions—one in Oregon and one in Alabama—have held that the United States has no *jus disponendi* of such lands, that it holds them merely in trust for the future state, and that, because each new state must be admitted to the Union on an equal footing with the older states, therefore it is not within the lawful power of the federal government to convey away any portion of its shores. In the Oregon case, the learned court remarked: "The tide-lands belong to the state of Oregon by virtue of its sovereignty. . . . But it is contended that this sovereignty did not attach until the state was admitted into the Union. This is true, but it is also equally true that the United States government has no constitutional or statutory authority to so act towards a territory, or so dispose of the lands within a territory, as to make it impossible to admit such territory upon an equal footing with the other states of the Union. In all matters which touch the sovereignty, the general government is, in the very nature of our system, simply a protector thereof until the territory assumes the ampler powers of a state, and becomes thereby enabled to assert and protect its own sovereignty."<sup>15</sup> And

<sup>15</sup> *Hinman v. Warren*, 6 Oreg. 408.

the decision in Alabama, so far as it deals with this subject, was ruled on substantially the same grounds.<sup>16</sup>

Now this doctrine, in so far as it can claim to have any foundation in authority, is based upon a misunderstanding of the celebrated case of *Pollard v. Hagan*,<sup>17</sup> or upon the employment, in the opinion in that case, of certain terms and expressions, which do indeed appear to lend countenance to the doctrine in question, but do not fairly warrant it when read in the light of the facts of the case and subjected to a proper scrutiny. One of the head-notes to that case reads as follows: "The shores of navigable waters and the soils under them, were not granted by the constitution to the United States, but were reserved to the states respectively; and the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states." And in the course of the opinion of the majority it was said: "To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty and deprive the states of the power to exercise a numerous and important class of police powers." But this case was concerned solely with the disposition of certain lands held by the United States under an express trust. And hence it is no authority whatever for the proposition that, in the absence of such a trust, the general government is restrained from disposing of tide-lands in a territory merely because that territory may afterwards become a state. This will sufficiently appear from the following extracts from the opinion of McKinley, J.: "The United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory of which

<sup>16</sup> *Mayor of Mobile v. Eslava*, 9 Port. 577.

<sup>17</sup> 3 How. 212. See, also, *Pollard v. Kibbe*, 9 How. 471.

Alabama or any of the new states were formed, except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia legislatures and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French Republic of the 30th of April, 1803, ceding Louisiana." And again: "Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete throughout their respective borders, and they and the original states will be upon an equal footing in all respects whatever. We therefore think the United States hold the public lands within the new states by force of the deeds of cession and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess or have reserved by compact with the new states for that particular purpose."

In a more recent case in the federal supreme court, the remark was made that tide-lands acquired by the United States by cession from Mexico were "held in trust for the future state" of California.<sup>18</sup> But the grant there to be construed was one made by the city of San Francisco, and hence the case has no direct bearing on the question of the power of the United States to convey such lands. And the case of *Hardin v. Jordan*<sup>19</sup> is sometimes referred to as if it supported the theory that shore-lands are inalienable by the federal government. But the patent in that case was issued after the admission of the state. And the point there decided was that a grant made by the United States, under such circumstances, extends no further than to high water mark. And it was observed that the title to the shores of navigable waters, and to the submerged lands, is incidental to the sovereignty of the state (that is, when

<sup>18</sup> *Weber v. Harbor Comm'rs*, 18 Wall. 57.

<sup>19</sup> 140 U. S. 371, 11 Sup. Ct. Rep. 808.



the state is organized), and cannot be retained (that is, retained by the United States upon the admission of the state) or granted out to individuals by the United States (that is, after the title of the state has attached.)

Upon reason and principle it is impossible to accept the theory of the Oregon court as correct. The rights and powers of the general government in respect to lands of which it is the proprietor cannot thus be restricted on the fanciful notion of a "trust" for a possible future state. It would scarcely be contended, for example, with any degree of seriousness, that the United States cannot lawfully convey to private persons lands embracing portions of the shore of Bering sea, merely because in the remote future, Alaska may possibly be erected into a state. It is true that a new state must be admitted into the Union on an "equal footing" with the older states. But this does not imply that it must be the owner of an equal amount of territory, or equally the source of title to all the lands within its boundaries. If this were so, the United States could never dispose of an acre of public land, inland or shore. The equality spoken of is political equality. And the sovereignty of the new state has nothing to do with its proprietary rights. Though it may not own any portion of its shore, it is sovereign over that shore, as much as over any other portion of its territory. For it will always retain the *jus publicum*, which can never be alienated either by the United States or by the state itself. It is this alone which is held in trust for the future state. And the remarks made in *Pollard v. Hagan* can properly be carried no further than this. For it was there observed that if the control of the shores could be granted away, the state would be deprived of many valuable police powers. But those powers the state still retains after the land has passed into private ownership. The true doctrine is, that

the United States may validly sell or otherwise dispose of the tide-lands bordering the coast of a territory, subject to the municipal control, or police jurisdiction, or the *jus publicum*, of the future state; and that when that state is admitted into the Union, it acquires the control as sovereign over all its shore, and as sovereign and proprietor over all such lands not previously granted away by the United States. In the remaining cases in which this question has been considered the correct view has been apprehended and applied.<sup>20</sup> But it was still believed, in some of the western states, that the matter was involved in such a degree of doubt as to call for some authoritative confirmation of titles thus derived. Accordingly the constitution of Washington declares that "the state of Washington disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States." And it is held that this was substantially a grant of the state's interest in such lands, and such interest passed to the grantee in a patent from the United States previously issued which covered lands lying between ordinary high and low tide.<sup>21</sup>

### § 238. State's ownership of shore and flats.

It is well settled that the state is the owner in fee of the seashore, and of the shores of all tidal rivers, estuaries, inlets, and bays, within its territorial jurisdiction, except in so far as portions of the same may have been already granted to private owners, and subject to the paramount right of congress to regulate commerce and navigation.<sup>22</sup>

<sup>20</sup> *Shively v. Welch*, 20 Fed. Rep. 28; *Case v. Toftus*, 39 Fed. Rep. 730.

<sup>21</sup> *Scurry v. Jones*, (Wash.) 30 Pac. Rep. 726.

<sup>22</sup> *Arnold v. Mundy*, 6 N. J. Law, 1, 10 Am. Dec. 356; *Gough v. Bell*, 21 N. J. Law, 156; *State v. Prosser*, (Wash.) 30 Pac. Rep. 734.

In California, it is said that the lands belonging to the state are distinguishable into two general classes; first, those which it owns by virtue of grants from the United States; second, those which it owns by reason of its sovereignty. And the second class includes the shore of the sea and of its bays and inlets, in the common law definition of the word "shore," that is, the space usually overflowed by the ordinary tides.<sup>23</sup> And the common law doctrine as to the dominion, sovereignty, and ownership of lands under tide-waters on the borders of the sea applies equally to the lands beneath the navigable waters of the Great Lakes; and such dominion, sovereignty, and ownership belong to the states, respectively, within whose borders such lands are situated, subject always to the right of congress to control the navigation so far as may be necessary for the regulation of foreign and interstate commerce.<sup>24</sup> As a consequence of this doctrine, it follows that a riparian owner of land bordering on tide-waters cannot maintain ejectment against persons who have taken possession of, and erected buildings on, the land below high tide mark, the title and power of disposal of which have been reserved to the state; the remedy, if any, is in equity.<sup>25</sup> It should be remarked, however, that in Massachusetts, by the colonial ordinance of 1647, the proprietors of upland bounding on the sea have an estate in fee in the adjoining flats above low water mark and within 100 rods of the upland, with full power to erect wharves and other buildings thereon, subject, however, to the reasonable use of other individual proprietors and of the public for the purposes of navigation, and subject also to such restraints and limitations of

<sup>23</sup> *People v. Morrill*, 26 Cal. 336; *Long Beach Land & W. Co. v. Richardson*, 70 Cal. 206, 11 Pac. Rep. 695.

<sup>24</sup> *Illinois Cent. R. Co. v. Illinois*, 13 Sup. Ct. Rep. 110.

<sup>25</sup> *Pierce v. Kennedy*, 2 Wash. St. 324, 26 Pac. Rep. 554.

the proprietors' use of them as the legislature may see fit to impose for the preservation and protection of public and private rights.<sup>26</sup>

### § 239. Nature of state's title.

While the state is thus the proprietor of its sea-coast and of the shores of tidal rivers and bays, it does not follow that it holds such property in quite the same manner as a private person may hold the fee simple of an estate in land. "It has been very common," says the learned court in Rhode Island, "to speak of the right of the state in the shores as a fee. This is proper only by analogy. To hold that the state owns the shores in fee in the same sense in which it owns a court-house or a prison, or in which the United States owns public lands, or a citizen may own land in fee, would lead to consequences which need only to be considered in order to show that such can never have been the nature of the right." The true doctrine is that such property of the state "is a trust for the public, a power to control and regulate, to subserve the good of the public, and not a private property."<sup>27</sup> And this view has the support of unimpeachable authority, as well as of sound reason.<sup>28</sup>

### § 240. Grant by state of tide-lands to private owner.

Some few cases are to be found in the books which seem to assert an absolute and unqualified right in the state

<sup>26</sup> Comm. v. Alger, 7 Cush. 53; Storer v. Freeman, 6 Mass. 435; Boston v. Richardson, 105 Mass. 351; Drake v. Curtis, 1 Cush. 395; Locke v. Motley, 2 Gray, 265.

<sup>27</sup> Providence Steam Engine Co. v. Providence & S. Steam-

ship Co., 12 R. I. 348, 34 Am. Rep. 652.

<sup>28</sup> Smith v. Maryland, 18 How. 71; Illinois Cent. R. Co. v. Illinois, 13 Sup. Ct. Rep. 110; Wilson v. Welch, 10 Oreg. 353, 7 Pac. Rep. 341.

to grant away its tide-lands as it may see fit, without reference to the rights of the public of which it is the conservator.<sup>29</sup> But these cases, if their particular facts require them to go this far, are inconsistent with the generally accepted doctrine stated in the preceding section,—that the title of the state to such lands is only a trust for the preservation and improvement of those public rights. As a necessary consequence of this doctrine it follows that the power of disposal vested in the state is limited to the sale or lease of the usufruct of the shore or waters, as by granting exclusive rights of fishery or the like, or the sale or grant of definite portions of its shore-land, not so great in amount as materially to impair the public rights, and made with the special intention that such grants shall be used for the building of wharves or other structures designed to be in aid of the public rights of navigation and commerce. These propositions are fully sustained by the decision of the United States supreme court in a very important case recently before it. It was held that a statute of Illinois, purporting to grant to the Illinois Central Railroad Company all the right and title of the state to the submerged lands constituting the bed of Lake Michigan, for one mile from the shore opposite the company's tracks and breakwater in the city of Chicago, to be held in perpetuity without power to alienate the fee, was in excess of the legislative power of the state, and inoperative to affect, modify, or in any respect control the sovereignty and dominion of the state over such lands or its ownership thereof, and consequently that it was within the constitutional power of the legislature to annul such grant by a subsequent repealing act.<sup>30</sup> In the course of

<sup>29</sup> Attorney General v. Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526; City of Galveston v. Menard, 23 Tex. 349.

<sup>30</sup> Illinois Cent. R. Co. v. Illi-

the opinion, after showing that the state's title to lands under the navigable waters of Lake Michigan was the same as the title of a state to soils under tide-waters by the common law, it was said: "But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire

nois, 13 Sup. Ct. Rep. 110. It should be noticed, however, that this case was in reality decided by a minority of the court. Mr. Chief Justice Fuller and Mr. Justice Blatchford

took no part in the decision, and Messrs. Justices Gray, Brown, and Shiras dissented. Consequently the opinion is that of the remaining four members of the court.

harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of the property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. . . . A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters; they cannot be placed entirely beyond the direction and control of the state."

In accordance with these general principles, it is held, in New York, that a grant of land under tide-water gives to the grantee a title to the soil, but does not authorize an interference with the public rights in the waters. Such grants are made in the interests of commerce, and operate as a license to the grantee to erect wharves and piers upon the lands granted, which those interests require. But while the grantee, by virtue of his proprietary interest, can exclude all other persons from the permanent occupation of the land granted, yet the state, by making the grant, does not divest itself of the right to regulate the use of the granted premises in the interest of the public and for the protection of commerce and navigation.<sup>31</sup> It is undoubted that the legislature may lawfully grant an usufructuary interest in the public waters, as a right to take fish, or to plant and gather oysters; and it may make such a grant to one citizen to the exclusion of others.<sup>32</sup> And the provision of the federal constitution that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states does not entitle the citizens of the various states to share in the common property of the citizens of a particular state. Hence it is competent for a state to confine the right of fishing in its navigable waters to its own citizens.<sup>33</sup> Furthermore, in so far as the state may grant away any portion of its tide-land, it may make such grant to any person, the littoral owner or a stranger, as it may see fit, unless restrained by a statute giving to the proprietor of the adjacent upland a preferential right to become the purchaser.<sup>34</sup> But, as we shall

<sup>31</sup> *People v. New York & Staten Island Ferry Co.*, 68 N. Y. 71.

<sup>32</sup> *Paul v. Hazleton*, 37 N. J. Law, 106; *Rogers v. Jones*, 1 Wend. 237.

<sup>33</sup> *McCready v. Virginia*, 94 U. S. 391; *State v. Medbury*, 3 R. I. 138.

<sup>34</sup> *Hoboken v. Penna. R. Co.*, 124 U. S. 656, 8 Sup. Ct. Rep. 643, s. c., 16 Fed. Rep. 816;



presently endeavor to show, the littoral owner, merely as such, has certain valuable rights, which are property, and which cannot be taken from him without compensation. And if this doctrine is established, it will follow that the state, in making a grant of tide-lands to a stranger, if the effect is to cut off the littoral owner from his access to the water, must compensate him for the deprivation.

It is also held that the title to the shore will not pass by implication. That is, a grant by the state of the upland will not carry the adjacent tide-land without express words.<sup>35</sup> But it seems that title to tide-lands may be acquired by the littoral owner making improvements upon them or reclaiming them, under an implied license from the state, or by force of a local custom,<sup>36</sup> and perhaps also by disclaimer by the paramount owner and the recognition of title in the claimant.<sup>37</sup> But exclusive riparian rights do not attach, as a matter of course, to a grant of lands under tide-water. Whether they do so or not depends upon the express terms of the grant, or upon the intent of the parties as shown by prior use, by the object of the grant, or by other circumstances from which the intent may be inferred. In the absence of an express grant of the right of wharfage, or of any manifest intent to convey it, no exclusive right of wharfage passes as incident to a grant by the state of land under water, below high water mark, in a harbor or navigable stream. "In the absence of an express grant of wharfage, or of such manifest intention, the city or the state, as the case may be, may make successive grants of its lands under water, each in front of the former, to different grantees, without any violation of the rights of either;

Martin v. O'Brien, 34 Miss. 21.

<sup>35</sup> Comm. v. Roxbury, 9 Gray, 451.

<sup>36</sup> Bell v. Gough, 23 N. J. Law, 624. See Stevens v. Pat-

erson & N. R. Co., 34 N. J. Law, 532.

<sup>37</sup> Dunham v. Townshend, 118 N. Y. 281, 23 N. E. Rep. 367.

and neither the first nor the last grantee will acquire any exclusive riparian privileges. None of such grantees are in any proper sense riparian owners at all, and riparian rights do not attach to such grants. In this state [New York], where the common law on the subject prevails, and the state is owner of the soil below high water mark, it was long since settled that a grant of such lands, even with a right to erect a wharf expressed in the grant, was by implication of law not an exclusive grant of wharfage rights, but that such rights, so long as they were not wholly cut off, were subject to be modified and abridged through other grants and other harbor regulations for the public benefit, without compensation.”<sup>38</sup>

**§ 241. Preferential right of littoral owner to purchase.**

In several of the states, where provision has been made for the sale of the tide-lands, the legislature has seen fit to enact that the littoral owners shall have the first or preferred right to purchase the portions of the shore adjacent to their several upland estates. No question appears to have been made of the competency of this legislation. And indeed it is eminently proper, as being in recognition of a natural right subsisting in the littoral owner by virtue of the advantages of his position. In New York, under the various statutes conferring authority upon the city of New York to grant rights under water in the harbor to others than the littoral owners on certain specified conditions, it is held that the granting of such rights, except upon compliance with such conditions, is by necessary implication forbidden.<sup>39</sup> In Oregon, the legislature, rec-

<sup>38</sup> *Turner v. People's Ferry Co.*, 21 Fed. Rep. 90, citing *Lansing v. Smith*, 8 Cow. 146.

<sup>39</sup> *Bedlow v. New York Dry Dock Co.*, 112 N. Y. 263, 19 N. E. Rep. 800.

ognizing the fact that the people had dealt with and sold the tide-lands adjacent to their uplands as their own, provided, by the act of 1874, that the purchaser of any tide-land from the owner of the land adjacent thereto, should have the right to purchase the same from the state. By this act, it is held, the legislature recognized the rights of purchasers from adjacent owners.<sup>40</sup> In Washington, an act passed in 1890 provided that the owners of any lands fronting on the Pacific ocean, or on any bay, harbor, etc., should have the right, for sixty days after final appraisal of tide-lands, to purchase such as were in front of the lands owned by them, "provided that if valuable improvements, in actual use for commerce, trade, or business, have been made upon said tide-lands, . . . the owners of such improvements shall have the exclusive right to purchase the land so improved for the period aforesaid." And under this statute it is held that a littoral owner cannot sue to enjoin the maintenance of structures on tidal land by persons who erected the same, and were in use and possession thereof, before the passage of the act.<sup>41</sup>

### § 242. Location of scrip on tide-lands.

The attempt has more than once been made to locate Valentine scrip on lands owned by the United States on the seashore between high and low water mark, but hitherto such locations have never been sustained. The act of congress for the relief of Valentine authorized the holder of this scrip to select unoccupied and unappropriated "public lands." And the ground of most of the decisions adverse to those who have claimed tide-lands under locations

<sup>40</sup> *De Force v. Welch*, 10 Oreg. 507.

<sup>41</sup> *Eisenbach v. Hatfield*, 2 Wash. St. 236, 26 Pac. Rep. 539.

so made is that the shores of the sea, or of other navigable waters, though the title thereto may remain in the United States, are not "public lands" within the meaning of this act. The supreme court has explicitly declared that these words are habitually used in the federal legislation to describe such lands as are subject to sale or disposition under general laws.<sup>42</sup> That is, not all lands owned by the general government are "public lands," but only such classes of lands—agricultural lands, mineral lands, desert lands, swamp lands, etc.—as have been thrown open to entry or purchase under general acts of congress. Now there is no general act of congress providing for the sale of tide-lands or lands covered by navigable waters. We must therefore understand that it was the intention of congress, in using the phrase "public lands" in the Valentine act, to authorize the location of this scrip only on lands the disposal of which is regulated by general laws, hence necessarily excluding tidal lands. It will be observed that it is not necessary here to raise any question of the power of the United States to dispose of shore-lands in a territory. Sound legal reason, as we have shown in a previous section,<sup>43</sup> compels the recognition of such a right in the general government if it shall choose to exercise it. But the question is solely whether such lands are included in the purview of the act under consideration.

This contention came fairly before the supreme court of Washington, in a case where the plaintiff, as owner of Valentine scrip, brought ejectment to recover certain lands, being portions of the tide-flats in Elliott bay, which are covered at ordinary high tide and uncovered at ordinary low tide, over which the defendant had erected buildings, but which plaintiff had selected at a time when they were

<sup>42</sup> *Newhall v. Sanger*, 92 U. S. 761.

<sup>43</sup> *Supra*, § 237.

unoccupied. It was held that the complaint was properly dismissed, since the premises were "water," and not "land," or at least not "public land" subject to entry under the statute. And it was added that the fact that the tract in question was not covered by navigable water, and was left bare at low tide, was immaterial, since high water mark is the limit of government grants.<sup>44</sup>

Such has also been the uniform course of decisions in the general land office of the United States. And although the rulings of department officers are only quasi-judicial, and, in respect to matters of law, are not binding on courts,<sup>45</sup> yet in questions of this character they are at least entitled to serious consideration and to a considerable degree of persuasive force. We think it not amiss, therefore, to direct the reader's attention to the case reported as *In re Burns*,<sup>46</sup> where it was held that unsurveyed lands within the territories, lying below high water mark, are

<sup>44</sup> *Baer v. Moran Bros. Co.*, 2 Wash. St. 608, 27 Pac. Rep. 470. In this case, the learned court observed: "Within the meaning of the acts of congress, and the policy thereby clearly established from the earliest times, the decisions of courts, and the general understanding, this is not 'land,' but 'water,' to which none of the public or special and private land laws, including the Valentine scrip act, have any application. It may be conceded that congress, by clear and explicit enactment, could have granted the bottom of navigable waters to any person it saw fit before the admission of the state, but it will not be contended that the language of the Valentine scrip act is to re-

ceive any construction other than that awarded to the hundreds of other acts which relate to the 'public lands' subject to Mr. Valentine's selection, or that the lands therein meant are any lands different from those subject to entry under the pre-emption, homestead, and other laws. Therefore it is but proper that, in construing this act, reference should be had in this manner to the hitherto universally sustained rule that 'public lands' means upland, and not soil beneath navigable waters."

<sup>45</sup> See 2 Black, Judgm. §§ 530, 531.

<sup>46</sup> 10 Land Dec. 365. Followed, *In re Kasson*, 13 Land Dec. 299.

not "public lands" subject to the location of Valentine scrip. "The words 'public lands' of the United States are used to designate such lands as are subject to sale and disposal under the general land laws, and do not include all lands to which the United States may have the legal title, or all lands that may be granted or disposed of by the United States."<sup>47</sup> And it is *res judicata* in the Department of the Interior that Valentine scrip cannot be located on the lake front in Chicago.<sup>48</sup>

Finally, there are certain decisions in California which, though not directly in point, are sufficiently analogous to the cases already cited to furnish a not inconsiderable support to the views here advocated. In one of these cases,<sup>49</sup> it was ruled that lands covered by the ebb and flow of the tide are not subject to location with school land warrants; nor does the location of such lands with such warrants confer on the locator a right to possession as against the true owner or amount to color of title. And in another case, the same court held that a certificate of purchase, as swamp and overflowed lands, of lands on the Sacramento river, situated below high water mark and over which the tide ebbs and flows, is void.<sup>50</sup>

### § 243. Public right of navigation.

While the shores of the sea, between the lines of high and low water, belonging to the adjacent nation, and are subject to its dominion and jurisdiction, yet they are subject to an easement in favor of the citizens of all nations, which entitles them to the lawful and proper use of the seashore

<sup>47</sup> Per Noble, Secretary of the Interior, in *Re Burns*, *supra*.

<sup>48</sup> In *re Valentine*, 5 Land Dec. 382; In *re Farson*, 2 Land Dec. 338.

<sup>49</sup> *Farish v. Coon*, 40 Cal. 33.

<sup>50</sup> *Taylor v. Underhill*, 40 Cal. 471; *People v. Morrill*, 26 Cal. 336.

for the purposes of navigation and commerce.<sup>51</sup> It is therefore immaterial, for this purpose, what is the location of the title to the strip between high and low water mark. Whether it remains in the United States, or the state, or has vested in a private owner, it is equally subject to the public right of navigation. Thus, in Massachusetts and Maine, by virtue of an ancient colonial ordinance, littoral owners are invested with title to the flats down to low water mark. But it is held that the right to use the waters covering such flats, for the purposes of navigation, was not abridged by this ordinance; and the owners of vessels exercised only their legal right of navigation by passing over such flats, when covered by water, and remaining upon them for commercial purposes from the ebb to the flow of the tide.<sup>52</sup>

#### § 244. Rights of littoral owner in general.

It is now generally agreed by the best authorities that while the title of a proprietor bounding on the sea terminates at ordinary high water mark, yet he is invested, by virtue of his littoral ownership, with certain valuable rights and privileges. Among the most important of these rights are (1) that of access from his land to navigable water, (2) the right to extend his land into the water by means of wharves subject to the qualification that he does not thereby injure the free navigation of the water by the public, (3) the right by accretion to whatever lands by natural or artificial means are reclaimed from the sea.<sup>53</sup> These several subjects will be fully considered in the succeeding

<sup>51</sup> *Steamboat Magnolia v. Marshall*, 39 Miss. 109.

<sup>52</sup> *Gerrish v. Proprietors of Union Wharf*, 26 Me. 384.

<sup>53</sup> *Mather v. Chapman*, 40

Conn. 382; *Providence Steam Engine Co. v. Providence & S. Steamship Co.*, 12 R. I. 348, 34 Am. Rep. 652. And see citations in the following sections.

sections. But here it is necessary to call attention to the fact that riparian or littoral rights are not considered an appurtenance to the land, but a mere incident of its ownership, arising out of the local or common law. And hence a grant by the United States of land bordering on navigable water is not such a conveyance of riparian rights as will give jurisdiction to a federal court of a contest over such rights, as involving a federal question.<sup>54</sup> In fact, the determination of what rights, if any, shall attach to the estate of a riparian or littoral proprietor, is undoubtedly a matter for each state to regulate for itself.<sup>55</sup> It is entirely competent for a state to enact that an owner of land on the seashore shall have no rights or privileges whatever merely in virtue of such ownership. And in just the same way it was competent for the Pacific states (as several of them have done) entirely to abrogate the common law doctrine of riparian rights on non-navigable streams. But it must be noted that this can only be done prospectively. That is, such a rule can only apply to estates thereafter acquired by private persons from the state or the United States. If it were attempted thus to strip off from the estates of private owners the rights incident to their contiguity to a stream or the sea, as those rights existed at the time when their estates vested, the supposed legislation would certainly be obnoxious to the charge of divesting vested rights, taking property without due process of law, and, in some cases, impairing the efficacy of grants made by the general government.

### § 245. Right of access to water.

We shall endeavor to show, in the succeeding sections, that the vast preponderance of authority, both in England

<sup>54</sup> *Kenyon v. Knipe*, 46 Fed. Rep. 309.

<sup>55</sup> *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. Rep. 808.



and the United States, recognizes the existence in the littoral proprietor of a right of access from his land to the water, or of free communication between his land and the water, which is a valuable property right, and of which he cannot be deprived without due compensation. It may appear singular that question should have been made of the correctness of this proposition. But the history of the discussion on this point, which is one of the most interesting in the story of our jurisprudence, will show the extraordinary tenacity of a legal heresy when once it is promulgated by an able and respected court.

**§ 246. Same; cases denying right of access.**

The New York court of appeals, not long after its organization, was called upon to determine the rights of a riparian proprietor on a navigable tidal river of the state, who claimed that he was damnified by the construction of a railroad along the shore of the river, in front of his land, on the strip between high and low water mark. It was adjudged that he had no property in the shore, but the same was the absolute property of the state to be disposed of as it might see fit, and that if he was deprived of access to the water, by reason of the shore being taken for the purposes of the railroad, he was not entitled to claim any compensation therefor.<sup>56</sup> This decision was approved and followed in several others in the same court.<sup>57</sup> Eventually it was overruled.<sup>58</sup> But in the mean time, for nearly half a century it had been the occasion of doubt, confusion, and sometimes error to many courts. Its first fruits were seen in a case in New Jersey, wherein it was ruled that as the

<sup>56</sup> Gould v. Hudson River R. Co., 6 N. Y. 522.

N. Y. 567; People v. Tibbetts, 19 N. Y. 523.

<sup>57</sup> See Smith v. Levinus, 8 N. Y. 472; Furman v. Mayor, 10

<sup>58</sup> See next section.

state is the absolute owner of the land underlying all the navigable waters within its territorial limits, such land can be granted by the state to any person, either public or private, without making compensation to the owner of the adjoining shore-land; in other words, it is competent for the legislature to grant the soil under the water so as to cut off the riparian proprietor from the benefits incident to his property by reason of its contiguity to the water.<sup>59</sup> Thus fortified, this erroneous doctrine next found its way into Iowa, where it was held that, as the owner of lands lying along the Mississippi river has no private right in the waters thereof, or in the shore between high and low water mark, he cannot recover damages for being deprived of access to the stream by reason of the construction of a railroad along its banks between such marks.<sup>60</sup> This decision was based entirely on the authority of the New York case and the New Jersey case just mentioned. But it must have impressed the people of Iowa as grossly unjust to the riparian proprietors. For it was not three years after its promulgation before the legislature passed an act providing that land-owners abutting on the Mississippi and Missouri rivers were authorized to construct and maintain in front of their property piers, cribs, booms, and other proper and convenient erections and devices for the use of their respective pursuits, and the protection and harbor of rafts, logs, floats, etc.; and "it shall not be lawful for any person or corporation to construct or operate any railroad or other obstruction between such lots or lands and either of said rivers, or upon the shore or margin thereof, unless

<sup>59</sup> *Stevens v. Paterson & N. R. Co.*, 34 N. J. Law, 532. This case was decided largely on the authority of the Gould case and on that of *Duke of Buccleuch v. Metropolitan Board of*

*Works*, L. R. 5 Ex. 221, which last case has since been reversed in the House of Lords. See, s. c., L. R. 5 H. L. 418.

<sup>60</sup> *Tomlin v. Dubuque, B. & M. R. Co.*, 32 Iowa, 106.

the injury and damage to such owners occasioned thereby shall be first ascertained and compensated.”<sup>61</sup> One other state court followed the lead of the New York decision, that, namely, of West Virginia. It was there held to be competent for the legislature to confer on municipal corporations, in aid of the navigation of the Ohio river, the exclusive right to construct wharves within their corporate limits between high and low water mark, without compensation to the adjacent lot-owner for the land so taken for that purpose.<sup>62</sup> But as this decision was largely influenced by the overruled or repudiated cases to which we have just referred, it is no longer entitled to any considerable weight as an authority.

Among the text-writers of repute, only one is found to be the champion of this fallacious doctrine.<sup>63</sup> And in order to sustain his conclusions this writer has found it necessary (as has been remarked from the bench) to attack and condemn “the opinion of the two highest courts of the civilized world.”<sup>64</sup>

The foregoing constituted the entire sum of the direct judicial authority in favor of this doctrine which denies the riparian owner’s right of access, until the rendition of the late decisions in Oregon and Washington, which we shall presently notice. We now proceed to recount the principal cases which are ranged on the other side of the controversy.

### § 247. Same; cases affirming right of access.

To begin with the decisions of the United States supreme court, the first case in that court dealing directly with the

<sup>61</sup> Iowa act of March 18, 1874; Code Iowa, §§ 1953, 1954.

<sup>62</sup> *Ravenswood v. Flemings*, 22 W. Va. 52.

<sup>63</sup> Wood, Nuisances, § 468.

<sup>64</sup> Dissenting opinion of Stiles, J., in *Eisenbach v. Hatfield*, 2 Wash. St. 236, 26 Pac. Rep. 539.

question in hand was *Dutton v. Strong*.<sup>65</sup> Herein it was adjudged that a riparian proprietor has a right to erect bridge piers and landing places on the shores of navigable rivers, lakes, bays, and arms of the sea (which of course necessarily includes the right of access to navigable water), provided they conform to the regulations of the state, if any, and do not obstruct the paramount right of navigation. This decision was repeated in the case of *Railroad Co. v. Schurmeir*.<sup>66</sup> And not long afterwards, the opinion of the court was more fully and explicitly declared, in the following terms: "Whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, and the right to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. . . . This riparian right is property and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation."<sup>67</sup> These three decisions settled the doctrine of the supreme federal tribunal upon lines from which it has never since departed. Some of its later utterances may seem, at first sight, to militate against this statement. But the apparent discrepancy will vanish the moment they are examined with reference to their particular facts.

<sup>65</sup> 1 Black, (U. S.) 23.

<sup>66</sup> 7 Wall. 272.

<sup>67</sup> *Yates v. Milwaukee*, 10 Wall. 497, Miller, J.

Thus, for example, in *Weber v. Harbor Commissioners*,<sup>68</sup> it was held that where a wharf was constructed without license on land belonging to the state, the state, having power to remove it, may, without regard to the existence of the wharf, authorize improvements in the harbor, by the construction of which the use of the wharf will necessarily be destroyed. But the distinguishing fact is that the owner of the wharf, in this case, was not a riparian proprietor. And the court took occasion to quote with approval the doctrine of *Yates v. Milwaukee*.<sup>69</sup> So also in regard to the case of *Hoboken v. Railroad Co.*<sup>70</sup> Here the only matter in issue and decided was whether the state of New Jersey, as the superior of the city of Hoboken, could wholly destroy the public right of passage over filled-up lands at the end of a street, beyond the end of the street as originally dedicated. No private person was complaining. And the court observed: "The right insisted on in these actions by the city of Hoboken is the public right, and not the right of individual citizens claiming by virtue of conveyances of lots abutting on streets made by Stevens or his successors to the title. The public right represented by the plaintiff is subordinate to the state and subject to its control. The state may release the obligation to the public, may discharge the land of the burden of the easement, and extinguish the public right to its enjoyment. Whatever it may do in that behalf conclusively binds the local authorities, when, as in the present cases, the rights of action asserted are based exclusively on the public

<sup>68</sup> 18 Wall. 57.

<sup>69</sup> 10 Wall. 497. In much the same way we may distinguish *Barney v. Keokuk*, 94 U. S. 324, and *McCready v. Virginia*, Id. 391. As further sustaining the statement of the text, see

*Transportation Co. v. Parkersburg*, 107 U. S. 699, 2 Sup. Ct. Rep. 732; *Potomac Steamboat Co. v. Upper Pot. S. Co.*, 109 U. S. 672, 3 Sup. Ct. Rep. 445.  
<sup>70</sup> 124 U. S. 656, 8 Sup. Ct. Rep. 643.

right." And finally, that the court intends fully to abide by the doctrine first settled, is shown by the following quotation from one of its latest decisions: "The plaintiff was a riparian proprietor on the river. If his title to the land in question is not sustained, he is no longer such riparian proprietor and is cut off from access to the river. Among his rights as a riparian proprietor are access to the navigable part of the river from the front of his land, and the right to make a landing, wharf, or pier, for his own use or the use of the public."<sup>71</sup>

The inferior federal courts have uniformly agreed in supporting the same view. Thus, in a case in the circuit court for the southern district of New York, it was held that where the owner of land is bounded on navigable water, he has a vested right to have the water remain contiguous to his property; and hence it is not permissible for the state, or its grantee of the land lying under the water, to fill into the water and build a new water-front before such owner's land, and so cut off the landing from the water. The state, having granted land bounded on a way, cannot afterwards remove the way without compensating the party injured.<sup>72</sup>

If we turn now to the English decisions, we shall find the riparian owner's right of access recognized and vindicated with equal clearness and emphasis. In an important case before the House of Lords, it appeared that the plaintiff was the owner of a garden on the bank of the Thames, and had a causeway running down from his garden to low water mark in the river. He was deprived of the use of this, and of his communication with the river, by the em-

<sup>71</sup> St. Louis v. Rutz, 138 U. S. 226, 246, 11 Sup. Ct. Rep. 337.

<sup>72</sup> Van Dolsen v. Mayor of New York, 17 Fed. Rep. 817. See, also, Tuck v. Olds, 29 Fed.

Rep. 738; State v. Illinois Cent. R. Co., 33 Fed. Rep. 730; Case v. Toftus, 39 Fed. Rep. 730; Bowman v. Wathen, 2 McL. 376.

bankment of the river and the formation of a road between it and his garden. It was held that, being a riparian owner, and having a right of access to the river and to the undisturbed flow of the river along the whole frontage of his property, he was entitled to damages for being deprived of these rights.<sup>73</sup> The whole subject received full and attentive consideration in the case of *Lyon v. Fishmongers' Co.*,<sup>74</sup> where the Lord Chancellor (Cairns) expressed himself as follows: "Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him qua owner or occupier of any lands on the bank, nor is it a right which per se he enjoys in a manner different from any other member of the public. But when this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no right of access to or from the river at the particular place; and it becomes a form of enjoyment of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damages or restrained by an injunction. . . . The taking away of river frontage of a wharf, or the raising of an impediment along the frontage, interrupting the access between the wharf and the river, may be an injury to the public right of navigation, but it is not the less an injury to the owner of the wharf, which, in the absence of any parliamentary authority, would be compensated by damages or altogether prevented. It ap-

<sup>73</sup> *Duke of Buccleuch v. Metro. Board of Works*, L. R. 5 H. L. 418, reversing s. c. 5 Ex. 221, on which earlier decision

some of the cases cited in the preceding section had relied.

<sup>74</sup> L. R. 1 App. Cas. 662.

appears to me impossible to say that a mode of enjoyment of land on the bank of a navigable river, which is thus valuable, and as to which a land-owner can thus protect himself against disturbance, is otherwise than a right or claim to which the owner of land on the bank of a river is by law entitled within the meaning of such a saving clause as that which I have read. . . . A riparian owner on a navigable river has, of course, superadded to his riparian rights the right of navigation over every part of the river, and on the other hand his riparian rights must be controlled in this respect, that whereas, in a non-navigable river, all the riparian owners might combine to divert, pollute, or diminish the stream, in a navigable river, the public right of navigation would intervene and would prevent this being done. But the doctrine would be a serious and alarming one, that a riparian owner on a public river, and even on a tidal public river, had none of the ordinary rights of a riparian owner, as such, to preserve the stream in its natural condition for all the usual purposes of the land, but that he must stand upon his right as one of the public to complain only of a nuisance or an interruption to the navigation. . . . I cannot entertain any doubt that the riparian owner on a navigable river, in addition to the right connected with navigation, to which he is entitled as one of the public, retains his rights, as an ordinary riparian owner, underlying and controlled by, but not extinguished by, the public right of navigation."

In New York, where the doctrine which we have described as a "legal heresy" first originated, the authority of the Gould Case was frequently questioned, and its correctness was never fully conceded by the courts or the legal profession. Still it continued to stand as the law of the state, until the consideration of cases involving the rights of property owners on public streets as against the



elevated railroads, and the recognition of the truth that streets and navigable rivers are equally public highways, and if the owner abutting on one has a right of access thereto so also has an owner abutting on the other, furnished an occasion for its complete and final overthrow. In 1889, a case arose in which the court of appeals ruled that the statute which authorized the grant of submerged lands only to the proprietors of the adjacent uplands amounted to the recognition of a right in such proprietors to have access to the water from their own lands.<sup>75</sup> But here the Gould Case was distinguished as inapplicable, the only question for determination being as to whether or not the plaintiffs were such "adjacent proprietors" at the time of the grant to them. Afterwards, another case came before the court, between the same parties,<sup>76</sup> and on the same facts. The decision was the same. The court stated the two propositions on which the defendant's case was based, the second being "that an upland owner has no right of way to the river as against one acting under state authority." And it was said: "As to the second proposition, the case of *Gould v. R. Co.*, 6 N. Y. 522, is cited. If that decision deserves to be followed to its full extent, it has no application to the present case." A third time the same case was brought before the court,<sup>77</sup> and here at last, as might have been predicted, the Gould Case was definitely overruled. It was herein remarked: "It may be observed that since the decision of the Gould Case, in 1852, this question, and questions of a kindred nature, have been elaborately examined, discussed, and settled in this court, in our highest federal tribunal, in the court of

<sup>75</sup> *Rumsey v. New York & N. E. R. Co.*, 114 N. Y. 423, 21 N. E. Rep. 1066.

<sup>76</sup> 125 N. Y. 681, 25 N. E. Rep. 1080.

<sup>77</sup> 133 N. Y. 79, 30 N. E. Rep. 654.

last resort in England, and in the highest courts of several of our sister states. The doctrine of that case has been repudiated or ignored in these decisions, and the rights of proprietors of lands upon rivers and public highways determined upon principles more in accord with reason and justice. The long line of decisions in this court, from the Story Case, 90 N. Y. 122, to the Kane Case, 125 N. Y. 164, 26 N. E. Rep. 278, hold that an owner of land abutting upon a public street has a property right in such street for the purposes of access, light, and air, and that the state has no power to grant to a railroad the right to occupy the street, when such occupation injuriously affects the enjoyment, by the property owner, of such rights, except by the exercise of the power of eminent domain; and when a street is thus used by the railroad, without condemnation proceedings or a grant from the property owner, it is responsible to him for any damages resulting therefrom. Unless there is some distinction to be made between the rights which pertain to an owner of land upon a public river and one upon a public street, which is not perceived, then the principles sanctioned by this court in these cases virtually overrule the Gould Case, as they are apparently irreconcilable." The learned court then proceeded to advert, with approbation, to the decisions in *Yates v. Milwaukee*,<sup>78</sup> the Duke of Buccleuch's case,<sup>79</sup> and various other decisions holding the opposite view from that originally advocated in New York, and concluded as follows: "It must now, we think, be regarded as the law in this state that an owner of land on a public river is entitled to such damages as he may have sustained as against a railroad company that constructs its road across his water front, and deprives him

<sup>78</sup> 10 Wall. 497.

<sup>79</sup> L. R. 5 H. L. 418.

of access to the navigable part of the stream, unless the owner has granted the right, or it has been obtained by the power of eminent domain. This principle cannot, of course, be extended so as to interfere with the right of the state to improve the navigation of the river, or with the power of congress to regulate commerce, under the provisions of the federal constitution."

In many other states the same doctrine has been recognized, early or late, and is now fully established. Thus in Rhode Island, the rule is that a riparian owner on navigable water has a right of access to the water, of which he cannot lawfully be deprived; and any one doing anything in front of the land of such owner which makes it less accessible, is liable in damages therefor.<sup>80</sup> In Connecticut, the cases very clearly recognize a right, vested in a proprietor bounding on the sea, to have free access to the deep water, and also to extend his lands into the water by means of wharves.<sup>81</sup> In Pennsylvania, the state may grant authority to make erections on the shore of navigable waters, between high and low water mark, and it may grant such authority to persons other than the riparian owner, so long as the latter "is not thereby deprived of access to and use of the river as a public highway, which is implied, if not expressed, in the grant to him of land bounded on the stream."<sup>82</sup> In North Carolina, it is said that a riparian or littoral owner has, at common law, a qualified interest in the water frontage belonging by nature to his land, and the right to construct thereon wharves, piers, or landings.<sup>83</sup> In Arkansas,

<sup>80</sup> *Clark v. Peckham*, 10 R. I. 35; *Providence Steam Engine Co. v. Providence & S. Steamship Co.*, 12 R. I. 348.

<sup>81</sup> *Mather v. Chapman*, 40 Conn. 382; *Simons v. French*,

25 Conn. 346; *Prior v. Swartz*, 62 Conn. 132, 25 Atl. Rep. 398.

<sup>82</sup> *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21.

<sup>83</sup> *Bond v. Wool*, 107 N. Car. 139, 12 S. E. Rep. 281.

riparian owners are entitled to recover the damages caused to their riparian rights by the wrongful construction of a railroad's tracks and landings along the margin and upon the banks of the stream.<sup>84</sup> In Missouri, a municipal corporation which projects a dike into a navigable stream, by which the water is diverted from the front of the riparian owner's land, is liable to him for the damage occasioned thereby.<sup>85</sup> In Wisconsin, it is held that a riparian proprietor bounding on navigable water has, as such, the exclusive right of access to and from the water in front of his land, and of building wharves and piers in aid of navigation, though not so as to interfere with the public easement; and these private rights grow out of his title to the land and have a pecuniary value, and their destruction or material abridgment is in general an injury entitling him to redress.<sup>86</sup> In Minnesota, "it is the well settled doctrine that the riparian owner has the fee to low water mark. But while he only has the fee to low water mark, he has certain riparian rights incident to the ownership of real estate bordering upon a navigable stream. Among these are the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain suitable landings, piers, and wharves, on and in front of his land, and to extend the same therefrom into the river to the point of navigability, even beyond low water mark, and to this extent exclusively to occupy for such and like purposes the bed of the stream, subordinate only to the paramount public right of navigation. These riparian rights are property, and cannot

<sup>84</sup> *Organ v. Memphis & L. R. R. Co.*, 51 Ark. 235, 11 S. W. Rep. 96.

<sup>85</sup> *Meyers v. St. Louis*, 8 Mo. App. 266; affirmed, 82 Mo. 367.

<sup>86</sup> *Delaplaine v. Chicago & N. W. R. Co.*, 42 Wis. 214; *Chapman v. Oshkosh & Miss. Riv. R. Co.*, 33 Wis. 629; *Holton v. Milwaukee*, 31 Wis. 27.

be taken away without paying just compensation therefor.”<sup>87</sup> Finally, the most approved text-writers agree in the opinion that the doctrine settled by the cases cited in this section is the only true and just doctrine on this subject. The theory that denies to the littoral owner the right of access, as a valuable property right, is characterized by them as founded on a “narrow and technical course of reasoning,” as “of at least doubtful authority,” and as open to very serious objection on grounds of constitutional law.<sup>88</sup>

### § 248. Same; cases in the Pacific states.

In California, it does not appear that the precise question of a littoral owner's right of access to the water has ever been distinctly passed upon. But in view of the attitude assumed by its courts with reference to the right of such an owner to construct wharves, their ruling on the former question, should it ever fairly arise, may be foreshadowed as probably contrary to the weight of authority in the eastern states. It is not very easy to construe together the various California decisions on the subject of wharfing rights, or to say how far they modify or limit each other. But the general result of these decisions appears to be as follows: (1) There is no common law right in the littoral owner to wharf out against his own land, but he may do so under a license from the state, and such license has been granted with respect to certain parts of the coast. (2) If a wharf is erected in the tide waters and upon soil

<sup>87</sup> Union Depot Co. v. Brunswick, 31 Minn. 297, 17 N. W. Rep. 626; Carli v. Stillwater Street Ry. Co., 23 Minn. 373, 10 N. W. Rep. 205; Brisbane v. St. Paul & S. C. R. Co., 23 Minn. 114; Miller v. Menden-

hall, 43 Minn. 95, 44 N. W. Rep. 1141.

<sup>88</sup> Cooley, Const. Lim. 544, note 1; 1 Dillon, Munic. Corp. § 106; 3 Washb. Real Prop. 417; Lewis, Em. Dom. § 78; Gould, Waters, § 150.

belonging to the state, without such license, it will belong to the state, and possession of the land and wharf, if withheld, may be recovered by the state in ejectment. But it does not follow that such wharf is a public nuisance, from the merely negative reason that the state has not licensed it; that is a question of fact. (3) If a riparian owner desires to wharf out and is unlawfully obstructed, he may sue for damages, or he may have the obstruction abated, but he cannot maintain ejectment. (4) If such owner refuses or omits to construct wharves or landings, which are necessary for commerce and navigation, the state may authorize a stranger to construct them in front of his land.<sup>89</sup> But it may be suggested that these doctrines are probably modified, to a considerable extent, by the later case of *Shirley v. Bishop*.<sup>90</sup>

In Oregon, the courts were at first disposed to follow the true rule without hesitation, but afterwards abandoned it in favor of the moribund doctrine of the early New York cases. In *Wilson v. Welch*<sup>91</sup> it was said: "A shore-owner upon tide-waters, or upon a navigable stream, possesses rights which of late are conceded to be property. They are not rights, as has often been supposed, that were derived from the state, though held and enjoyed in subordination to the rights of the public. The embarrassing feature of this subject has arisen out of a misunderstanding of the nature of the state's ownership of land between high and low water upon navigable streams. It has been spoken of as an ownership in fee, and an erroneous impression has been conveyed. The state does own the channel of the navigable rivers within its boundaries, and

<sup>89</sup> See *People v. Davidson*, 30 Cal. 379; *Dana v. Jackson Street Wharf Co.*, 31 Cal. 118; *Coburn v. Ames*, 52 Cal. 385; *Polit. Code Cal.* §§ 2906, 2917. <sup>90</sup> 67 Cal. 543, 8 Pac. Rep. 82. <sup>91</sup> 12 Oreg. 353, 7 Pac. Rep. 341.

the shores of its bays, harbors, and inlets between high and low water, but its ownership is a trust for the public. It has no such proprietorship in them as it has in its property and public buildings.<sup>92</sup> It cannot sell them so as to deprive the public of their enjoyment; nor can it take away riparian rights except for public use, and by giving just compensation. The New York courts have taken a different view, and which has been followed by an Iowa decision; but it is repudiated by the federal and most of the state tribunals."<sup>93</sup> And in a later case it was fairly decided that an owner of land bounded by navigable waters possesses important riparian rights, by virtue of such ownership, including the right to build wharves out to such a depth of water as will enable vessels navigating it to touch at such wharves and receive and discharge freight; and he has the right to use the shore in front of his land for any purpose not inconsistent with the rights of the public.<sup>94</sup> But then, after the decision in *Eisenbach v. Hatfield*, in Washington, which we shall presently notice, the Oregon court, repudiating its former rulings, decided that, as the title to land over which the tide ebbs and flows is in the state, a conveyance thereof vests the absolute title in the grantee; whence it follows, of course, that the rights of the littoral owner may be entirely disregarded. In this case, the court reached the conclusion that "an upland owner on tidal waters has no rights, as against the state or its grantees, to extend wharves in front of his land, or to any private or exclusive rights whatever in the tide-lands, except as he has derived them from the statute."<sup>95</sup>

<sup>92</sup> *Supra*, § 239.

<sup>93</sup> Per Thayer, J. And the same judge reiterated these doctrines, as his individual opinion, in the subsequent case of *McCann v. Oregon Ry. Co.*, 13

Oreg. 455, 11 Pac. Rep. 236.

<sup>94</sup> *Parker v. West Coast Packing Co.*, 17 Oreg. 510, 21 Pac. Rep. 822.

<sup>95</sup> *Bowlby v. Shively*, (Oreg.) 30 Pac. Rep. 154.

In the state of Washington, when this question was first fairly presented to the supreme court, in an important case which was fully argued and fully considered, it was held that, the title to the tide-lands being in the state, a riparian owner could claim no easement in them, nor impose any servitude upon them, without the consent of the legislature, and, as a consequence, that there was no foundation for the riparian owner's claim of rights of access, wharfing, ferriage, accretion, etc.<sup>96</sup> It cannot be said that the opinion in this case is very satisfactory, either in respect to its line of argument or to its treatment of the authorities. But the same remark does not apply to the remarkably able and vigorous dissenting opinion of Mr. Justice Stiles. Herein the true doctrine is vindicated with much learning and sound reasoning. And in particular we deem it important to call the reader's attention to the following passages, in which the ultimate and irrefutable foundation of the riparian owner's right is very clearly set forth. Speaking of the conclusion reached by the majority of the court, Judge Stiles observes: "To my mind, in reaching its conclusion, it has completely ignored the prime common source of the state's title and of the riparian claim to access, which is that the navigable waters are natural public highways. Yet, as compared with this matter of substance, all questions of reclamation, of accretion, and reliction, of fishery and seaweed, pale and fade into insignificance. It is as highways that the sovereignties of the world, and particularly our own, have any jurisdiction over the navigable waters, differing in any respect from their jurisdiction over the fast land, and their different jurisdiction is of precisely the same character as the jurisdiction over highways upon the land. Under the constitution of the United States, congress

<sup>96</sup> *Eisenbach v. Hatfield*, 2 Wash. St. 236, 26 Pac. Rep. 539.



has the power to regulate commerce between the states and with foreign nations; but, while under this power it has never yet undertaken to dictate concerning the manner of construction of any land highway not undertaken by itself, it has gone upon the water highways, both tide and fresh, and assumed the broadest control, deepening channels, changing harbors, building dikes, and regulating the building of bridges, in all of which it has been sustained by the supreme court of the United States, solely because the waters are natural highways. But it is at this point that the opponents of the riparian right of access make their strong stand, and where the forces of the parties for and against meet in final conflict; and that the court did not see fit to allude to this phase of the question is greatly to be regretted. For the real question involved here is not whether the owner of upland bordering upon the sea has any adverse claim to the soil under the water, as against the state, but whether, being upon his own fast land, he can step therefrom upon the public highway, and there, as a member of the public, enjoy the public right of passage.

“In the case at bar, the appellants, possessing themselves of the exact line which borders the land and the highway, say to the land-owner: ‘You can reach the water by yonder street, or, if you will wait until we have built a wharf here, you can pass over it at the same rate of toll as any other person. In the mean time you cannot pass at all.’ The appellants, however, in order to sustain their own position, are forced to maintain the very doctrine they fight against,—that of the right of access. They oppose the upland owner’s access, but, having planted themselves in the highway, they propose to build wharves and maintain access themselves. By their improvements they propose to turn the shallows into land, and then will claim

that access to the water is necessary to its enjoyment. But here is land formed by nature, that since time was had no other outlet than over the sea, put there by nature as a highway. The land passed from the sovereign owner, by right of discovery the United States, by solemn patent, to the appellee, who is now told that the highway he relied upon is forever closed, without his consent and without any compensation for his loss. Has he been damaged? 'Actually; oh, yes,' will be admitted by his bitterest opponent; 'but not in law, because the title to the land beneath this water is in the state.' But wherein does the nature of the state's title to soil under navigable waters differ from that of its title to soil of a land highway? No writer or court that I have been able to consult points out the distinction, if there be one, except the subjection of the state's title in the submerged soil to the constitutional powers of congress. If the purposes to be subserved by the state's holding the two titles are identical, viz., the perpetuation of highways, then it seems extremely difficult to argue on any secure or even plausible ground that the owner of land abutting on the sea has not the same right of access to and continuance of his highway as his neighbor who abuts upon a land highway. Certainly it is not necessary to argue what the rights of an abutter on a road or street are. The state, or its hand-maidens, the county, township, or municipal corporation, regulate and improve the way, but they cannot destroy it, or injure the abutter's direct access to it from every part of his frontage, without compensation. A late writer on this subject says:

"Once a highway, always a highway," is an old maxim of the common law, to which we have often referred, and so far as concerns the rights of abutters, or others occupying a similar position, who have lawfully and in

good faith invested or obtained property interests, in the just expectation of the continued existence of the highway, the maxim still holds good. Not even the legislature can take away such rights without compensation.'<sup>97</sup>

Later decisions of this court have not in any degree departed from the doctrine of the Eisenbach Case, but on the contrary have confirmed the rulings there made. In one of the late cases, it is held that a littoral land-owner cannot assert title to land lying below the line of ordinary high tide, as against the state, in the absence of a license from the state; that the provision of the state constitution for the establishment of harbor lines did not recognize any rights in riparian owners to tide-lands, unless under licenses from the state; and that where a riparian proprietor has no right or title to tide-lands, merely owning the wharf thereon, the inclusion of such lands within the harbor lines is not such an interference with the ownership or possession of the wharf as will authorize the issue of a writ of prohibition to the harbor line commissioners.<sup>98</sup> This case went, on error, to the supreme court of the United States.<sup>99</sup> But that court declined to pass upon the merits of the questions involved, on the ground that no federal question was so raised upon the record as to justify its interposition. Mr. Chief Justice Fuller observed, *inter alia*: "We cannot accede to the position that the action of the harbor line commissioners in locating the harbor line and filing the plat would take any of relator's property,

<sup>97</sup> Citing Elliot, *Roads & S.* p. 658. The principle is then still further illustrated by the cases of *Abendroth v. R. Co.*, (N. Y.) 25 N. E. Rep. 496; *Story's Case*, 90 N. Y. 122; and *Lahr v. R. Co.*, 104 N. Y. 268, 10 N. E. Rep. 528.

<sup>98</sup> *State ex rel. Yesler v. Prosser*, 2 Wash. St. 530, 27 Pac. Rep. 550.

<sup>99</sup> *Yesler v. Board of Harbor Line Commissioners*, 13 Sup. Ct. Rep. 190.

or so injuriously affect it as to come within the constitutional inhibition. The filing of maps of definite location, in the exercise of the power of eminent domain, furnishes no analogy. The design of the state law is to prohibit the encroachment by private individuals and corporations on navigable waters, and to secure a uniform water front; and it does not appear from relator's application that the defendants have threatened in any manner to disturb him in his possession, nor that that which is proposed to be done tends to produce that effect. Whatever his rights, they remained the same after as before, and the proceedings, as the supreme court said, could not operate to constitute a cloud upon them from the standpoint of relator himself, for, if nothing further could lawfully be done in the absence of legislation for his protection, that was apparent. The consequences which he deprecated were too remote to form the basis of decision. Whatever private rights or property he has by virtue of the territorial act of 1854 or of the state act of 1890, whatever his right of access to navigable waters or to construct a wharf from his own land, we do not see that he would be deprived of any of them by the action he has sought to prohibit. It may be true that the width of the reserved strip as delineated on the map brings the inner line across the outer end of relator's wharf, in respect of which, as if it were the harbor line, he complains that his right under the act of March 26, 1890, to purchase the ground occupied by his improvements, would be interfered with; but the construction of that act is for the state court to determine, and the averments of the affidavit and alternative writ make no issue upon it, as affected by the constitutional provision."<sup>100</sup>

<sup>100</sup> See, also, *State ex rel. Columbia & P. S. R. Co. v. Prosser*, (Wash.) 30 Pac. Rep. 734.

**§ 249. Same; conclusions from the authorities.**

The foregoing review of the authorities leads us to the conclusion that the doctrine which denies to the littoral owner, as such, a valuable property right, including the privilege of free access from his land to the water, is contrary alike to authority, sound reason, justice, and the settled principles of constitutional law.

First, it is contrary to authority. We have seen that it was first advanced by the court in New York in the Gould Case, and was thence adopted in three other states. But it was repeatedly questioned and criticised, and its authority diminished from year to year. In the state of its origin it was regarded as an incubus, and became so intolerable that it was finally necessary to destroy it. And now at last all the cases which had embraced this doctrine (with the exception of the late decisions in Oregon and Washington) have been either overruled, reversed, repudiated, counteracted by legislative interference, or stand discredited by the demolition of the authorities on which they had relied. On the other hand, the true doctrine, as announced by the supreme court of the United States and the court of last resort in England, has constantly gained wider and wider recognition and has become more and more firmly implanted in our jurisprudence. The line of cases which supports it may now be described, in the phrase once used by a learned judge, as "not a current, but a torrent, of judicial decisions."

Secondly, the doctrine denying the riparian owner's right of access is contrary to sound legal reason. This becomes obvious the moment we recognize the truth that public waters, like public streets, are public highways, and that upon this fact alone must ultimately rest both the state's title and the riparian owner's rights. This consideration was so fully worked out in the opinion of Judge

Stiles, quoted in the preceding section, as to require no further elucidation here.

Thirdly, this doctrine is contrary to justice. This has always been perceived, and often urged, as one of the most serious objections to it, and was one of the principal reasons for the final overthrow of the cases which had first advocated it. The common sentiment of men recognizes the decided natural advantages of a proprietor bounding on navigable water, and the common sense of fairness revolts against his being deprived of these advantages arbitrarily or without compensation or equivalent.

Fourthly, the doctrine is contrary to the established principles of constitutional law. If there were no other argument to prove this thesis, it would be sufficiently demonstrated by the fact that the very states which have adopted the doctrine in question have passed statutes according to littoral owners a preferential right to purchase the adjoining tide-lands. Now these statutes must necessarily amount to a recognition of the existence of superior rights and privileges in such owners. For if it were otherwise, their partiality and favoritism would be so palpable and gross as to render them utterly indefensible. But the moment the state thus recognizes such rights,—sufficient to justify it in thus preferring such owners,—it will be impossible to escape the conclusion that if such rights are valuable for one purpose they are valuable for all purposes, and that the destruction or impairment of them, unless compensation be duly made, is forbidden by the constitution.

In view of all the foregoing decisions, it is a matter for much regret that the courts of Oregon and Washington should have committed themselves to the support of a doctrine so false and so untenable. But unless these decisions are speedily overruled, they will crystallize into an inflexible rule of property, to the discredit of their jurisprudence and the perpetuation of injustice.

**§ 250. Right to build wharves and landings.**

According to the general consensus of judicial opinion in this country, the littoral owner's right of access from his land to the water involves the right to provide an available means of access to his land from the navigable water. And it is held that it is lawful for him to construct a wharf, pier, or landing in front of his land, for his own use or the use of the public, extending the same as far out as may be necessary to enable vessels to reach it, provided that such structures do not in any way impede or interfere with the public right of navigation, and provided further that the same conform to the regulations, if any, which the state or municipal authorities may see fit to impose in the interests of commerce and navigation.<sup>101</sup> In the state of California, however, this doctrine is subject to considerable modification, as may be seen from the course of judicial decisions there rendered with reference to wharfing rights.<sup>102</sup>

Now it is well settled that the littoral owner's actual title extends no further than to ordinary high water mark,

<sup>101</sup> *Dutton v. Strong*, 1 Black, (U. S.) 23; *Railroad Co. v. Schurmeir*, 7 Wall. 272; *Yates v. Milwaukee*, 10 Wall. 497; *Potomac Steamboat Co. v. Upper Pot. S. Co.*, 109 U. S. 672, 3 Sup. Ct. Rep. 445, and 4 Sup. Ct. Rep. 15; *St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. Rep. 337; *Tuck v. Olds*, 29 Fed. Rep. 738; *State v. Illinois Cent. R. Co.*, 33 Fed. Rep. 730; *Case v. Toftus*, 39 Fed. Rep. 730; *Providence Steam Engine Co. v. Providence & S. Steamship Co.*, 12 R. I. 348; *Simons v. French*, 25 Conn. 346; *Mather v. Chapman*, 40 Conn. 382; *Prior v.*

*Swartz*, 62 Conn. 132, 25 Atl. Rep. 398; *Bond v. Wool*, 107 N. Car. 139, 12 S. E. Rep. 281; *Union Depot Co. v. Brunswick*, 31 Minn. 297, 17 N. W. Rep. 626; *Miller v. Mendenhall*, 43 Minn. 95, 44 N. W. Rep. 1141; *Delaplaine v. Chicago & N. W. R. Co.*, 42 Wis. 214; *Parker v. West Coast Packing Co.*, 17 Oreg. 510, 21 Pac. Rep. 822.

<sup>102</sup> See *People v. Davidson*, 30 Cal. 379; *Dana v. Jackson Street Wharf Co.*, 31 Cal. 118; *Coburn v. Ames*, 52 Cal. 385; *Shirley v. Bishop*, 67 Cal. 543, 8 Pac. Rep. 82.

and that if he possesses a qualified interest in the shore, this will embrace no more land than that which lies above low water mark. Yet the cases just cited show that he is allowed to build his wharf or pier out to the point of navigability, which will usually be beyond low water mark, thus covering a portion of the soil which belongs to the state. It has been suggested, in explanation of this, that the right to wharf may be derived by strict analogy from the abutter's right in connection with a land highway. For as it is admitted to be the right of an abutter, where the improved road-way covers but a narrow strip in the middle of the way, to build for himself a convenient means to reach the travelled track over the intervening land, so also, on the water-way, the navigable part of the water is the actual way, to which the wharf is the reasonable means of access.<sup>103</sup> But this is not altogether satisfactory, because it must be confessed that it was otherwise at common law. By the English law, the private owner has no right to extend his wharf beyond low water mark without license from the crown. If he does so, and the structure amounts to an obstruction of navigation, it is a nuisance. And even if the wharf does not in any manner impede or impair the public right of navigation, still it is liable to be abated or demolished by royal authority, as being an encroachment or trespass upon the public domain, called a "purpresture."<sup>104</sup> Now, in this country, the state is equally the owner of the shores of navigable waters. Hence it appears that the only solid foundation for the littoral owner's right to wharf out to the line of navigability must be sought in an implied license from the state, author-

<sup>103</sup> Per Stiles, J., in *Eisenbach v. Hatfield*, 2 Wash. St. 236, 26 Pac. Rep. 539.

<sup>104</sup> See Angell, *Tide-Waters*,

198; Gould, *Waters*, §§ 21, 93, 167; *Attorney General v. Ewart Booming Co.*, 34 Mich. 462.



izing him to do so, which may easily be inferred from the general policy and duty of the state to encourage and promote navigation and commerce, and which, for that very reason, would always be subject to the proviso that it must not be so exercised as to interfere with the equal rights of others or with the general rights of the public in the use of the waters for those purposes. But it must be added that, on familiar principles of law, such an implied license, when once acted on, would become irrevocable. So that it would not be consistent with the constitutional rights of the owner to destroy his wharf, or materially impair its value, even though built on a portion of the public domain, except by due process of law and upon compensation made.

But the erection of a wharf below low water mark, without express license, gives the builder no possession or color of title beyond the limits of the land under water actually covered by the wharf, and does not draw after it any exclusive right to the use of the open space by the side of it, for the purposes of a dock by way of easement, as appurtenant to the wharf.<sup>105</sup> The owner, if he chooses, may intend and reserve the wharf for his own private use. And when this is the case, and he has never held it out as intended for the use of others, no implication arises, if a party without leave moors his vessel thereto, that he has done so with the owner's consent. Where a vessel is thus wrongfully attached to a pier without the consent of the owner, no peril of the vessel, however great, imposes any obligation on such owner to allow it to remain, and hazard his own property to save that of a trespasser.<sup>106</sup> But the grant of a right of wharfage at a wharf adjoining land

<sup>105</sup> Gray v. Bartlett, 20 Pick. 186. See, also, Bond v. Wool, 107 N. Car. 139, 12 S. E. Rep. 281.

<sup>106</sup> Dutton v. Strong, 1 Black, (U. S.) 23.

under water belonging to the grantor, carries with it, as a necessary incident and appurtenance, and in legal effect as part of the grant, a right of way or access to the wharf for vessels over the grantor's adjacent land under water.<sup>107</sup>

In Oregon, a statute has been enacted which provides that "the owner of any land in this state lying upon any navigable stream or other like water, and within the corporate limits of any incorporated town therein, is hereby authorized to construct a wharf or wharves upon the same, and extend such wharf or wharves into such stream or other like water beyond low water mark so far as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream or other like water," power being reserved to the corporate authorities of the town, by ordinance or otherwise, to regulate the exercise of this privilege.<sup>108</sup> This statute, however—so it is held—is not a grant of the tide-land; and where the license thereby given is not exercised before a grant of the tide-land, the license does not continue in any such sense as to authorize an interference with the rights of the grantee of such land.<sup>109</sup>

### § 251. Establishment of harbor lines.

It is undoubtedly within the power of the state legislature to prescribe the lines, in its harbors, beyond which wharves, piers, docks, and other structures (other than those erected under the express or implied authority of the general government) may not be built by riparian

<sup>107</sup> Langdon v. Mayor of New York, 93 N. Y. 129.

<sup>108</sup> 2 Hill's Ann. Laws Oreg. §§ 4227, 4228.

<sup>109</sup> Bowlby v. Shively, (Oreg.)

30 Pac. Rep. 154. And see Parker v. West Coast Packing Co., 17 Oreg. 510, 21 Pac. Rep. 822; Parker v. Taylor, 7 Oreg. 435.

owners in the navigable waters of such harbors.<sup>110</sup> The constitution of the state of Washington has made provision for the appointment of a commission to establish harbor lines in the navigable waters of all harbors in the state, within or in front of the corporate limits of a city, or within a mile thereof, and for the leasing of the right to build and maintain wharves, docks, and other structures. And the supreme court of that state has held that, under these provisions, a littoral owner has no authority, as such, to extend wharves in front of his land below high water mark; and that the constitution does not recognize any rights in such littoral owners to tide-lands, unless under licenses from the state, and the commission may include such lands within the harbor lines.<sup>111</sup> But, as we have endeavored to show in a preceding section<sup>112</sup> there is very serious reason to doubt the correctness of these rulings, in so far as they refuse to recognize the rights attaching to riparian ownership as such. And in Minnesota, on the other hand, it is held that the establishment by legislative authority of a harbor or dock line in navigable waters is an implied grant to the owners of the adjacent upland of the right to occupy the land between low water mark and such line, title to which is in the state, and to build on or fill up the same so as to extend the upland to such dock-line.<sup>113</sup>

### § 252. Right to accretions.

“The rule governing additions made to land bounded by a river, lake, or sea, has been much discussed and va-

<sup>110</sup> State v. Illinois Cent. R. Co., 33 Fed. Rep. 730.

<sup>111</sup> Eisenbach v. Hatfield, 2 Wash. St. 236, 26 Pac. Rep.

539; State v. Prosser, 2 Wash. St. 530, 27 Pac. Rep. 550.

<sup>112</sup> Supra, §§ 247-249.

<sup>113</sup> Miller v. Mendenhall, 43 Minn. 95, 44 N. W. Rep. 1141.

riously settled by usage and by positive law. Almost all jurists and legislators, however, both ancient and modern, have agreed that the owner of the land thus bounded is entitled to these additions. By some, the rule has been vindicated on the principle of natural justice, that he who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever benefits they may bring by accretion; by others, it is derived from the principle of public policy, that it is the interest of the community that all land should have an owner, and most convenient that insensible additions to the shore should follow the title to the shore itself."<sup>114</sup> And the same rule applies whether the accretion is attributable purely to natural causes or to the wrongful deposit, by human agency, of soil in the ocean or other public waters in front of the upland. Thus, where one of two coterminous proprietors of land bounded on a cove, by filling in, makes new land, extending into the cove opposite the premises of both, the new-made land should be divided between them as if it were natural alluvion.<sup>115</sup> And in one case, where a pier was unlawfully built in front of a littoral owner's property, shutting off access to his wharf, it was held that the pier was to be treated as an accretion and became the property of the shore-owner.<sup>116</sup> But in California it is said that the doctrine of accretion does not apply to a marine increase of alluvion caused by a purpresture by the erection of a wharf in a public harbor.<sup>117</sup> A party who sells the entire estate owned by him up to the line of a public road or street bordering a river, and beyond which no property susceptible of private ownership exists at the date of the

<sup>114</sup> *Banks v. Ogden*, 2 Wall. 57.

<sup>115</sup> *Watson v. Horne*, 64 N. H. 416, 13 Atl. Rep. 789.

<sup>116</sup> *Steers v. Brooklyn*, 101 N. Y. 51, 4 N. E. Rep. 7.

<sup>117</sup> *Dana v. Jackson Street Wharf Co.*, 31 Cal. 118.

sale, retains no estate to which the accessory right to future alluvion could attach.<sup>118</sup> As a corollary to the doctrine of accretion we have the rule that the proprietor of land bounding on the sea has the right to sea-weed cast by extraordinary floods above ordinary high water mark. As owner of the soil he is constructively the first occupant of it. But sea-weed cast and left upon the shore, that is, between ordinary high and low water mark, belongs to the public, and may lawfully be appropriated by the first occupant.<sup>119</sup>

### § 253. Rights of fishing.

Since the beds of public navigable rivers and the sea-shore below high water mark, together with all bays, ports, and estuaries, belong to the people in their sovereign capacity, for the common use of all the inhabitants, it follows that the right of fishing in such waters is free and open to all the citizens of the state, except in so far as the same may have been restricted by legislative grants of exclusive privileges.<sup>120</sup> In reference to the land underlying such navigable waters, it has been said: "This soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell-fish as floating fish. The state holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable or destroy it altogether.

<sup>118</sup> *Delachaise v. Maginnis*, (La.) 11 South. Rep. 715.

<sup>119</sup> *Mather v. Chapman*, 40 Conn. 382.

<sup>120</sup> *Arnold v. Mundy*, 6 N. J. Law, 1, 10 Am. Dec. 356; *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57.

This power results from the ownership of the soil, from the legislative jurisdiction of the state over it, and from its duty to preserve unimpaired those public uses for which the soil is held.<sup>121</sup> Hence the riparian or littoral owner, merely as such, has not an exclusive right of fishing in the waters adjacent to his premises, nor any right, in that respect, other than what he enjoys as a member of the public. And while the owner of a beach has the right of drawing his seine to that beach, in exclusion of others, yet he cannot acquire the sole right of fishing in a defined portion of the waters of a navigable sound independently of all others.<sup>122</sup> But the public rights, in this as in all other respects, must be exercised with a due regard to the rights of the riparian owner and without injury or trespassing upon his property. The public, for example, have no right to land fish upon private property above high water mark.<sup>123</sup> Nor to erect huts on the shore for purposes connected with their fishing.<sup>124</sup> It has also been held that one who plants oysters in the bed of a navigable river has no such property therein that he can maintain trespass against a person taking them away, although he owns the adjacent shore.<sup>125</sup>

### § 254. Severance of riparian rights.

If the rights of a riparian or littoral proprietor, as such, are recognized as substantial property rights, it becomes important to determine whether these rights are sepa-

<sup>121</sup> *Smith v. Maryland*, 18 How. 71.

<sup>122</sup> *Skinner v. Hettrick*, 73 N. Car. 53; *Hettrick v. Page*, 82 N. Car. 65.

<sup>123</sup> *Bickel v. Polk*, 5 Harr. (Del.) 325.

<sup>124</sup> *Cortelyou v. Van Brundt*, 2 Johns. 357.

<sup>125</sup> *Arnold v. Mundy*, 6 N. J. Law, 1. See *Westfall v. Van Anker*, 12 Johns. 425; *Freary v. Cooke*, 14 Mass. 488. Compare *Pitkin v. Olmstead*, 1 Root, 217.

rable from the ownership of the upland or so far appurtenant to it as to be inseparably annexed thereto. In Minnesota, where this question has been much mooted, it was at first held that riparian rights belong to and are incident to the abutting shore, and cannot be severed or transferred apart from the shore, so as to be rights in gross.<sup>126</sup> But this decision was afterwards overruled. The grounds assigned for departing from the former decision rested mainly upon the consideration that the riparian proprietor has the right to improve and reclaim the land out to the point of navigability, and that this right is recognized as a valuable property right; that it is not necessarily dependent on the ownership of the abutting land; and that it is for the interest of the public that such right should be exercised.<sup>127</sup> From the opinion on reargument, in the case cited, we quote the following summary of the reasons which induced the court to take its present position: "We have thus considered that the riparian proprietor has the exclusive right—absolute as respects every one but the state, and limited only by the public interests of the state for purposes connected with navigation—to improve, reclaim, and occupy the submerged land, out to the point of navigability, for any private purpose, as he might do if it were his separate estate; that this right, even though it may never have been exercised, is recognized and protected by the law as property, of which he cannot be deprived even by the state without just compensation; that the enjoyment of the right—the use of the premises—need not be associated with the use of the upland; that it is for the interest of the state that such

<sup>126</sup> *Lake Superior Land Co. v. R. Co.*, 43 Minn. 104, 42 N. W. Rep. 596, and 44 N. W. Rep. 1144.  
*Emerson*, 33 Minn. 406, 38 N. W. Rep. 200.

<sup>127</sup> *Hanford v. St. Paul & D.*

waste lands be improved and rendered profitable, while the state is not concerned as to whether the owner of the adjacent upland, or some person to whom he may release his right, makes the improvement and enjoys the private benefit; that the rights of other persons are not involved in the question; that when the land has been reclaimed it may be conveyed, according to most of the authorities, apart from the original upland; and that, according to other authorities, the riparian right may be transferred to and enjoyed by the owner of the next adjacent riparian estate. From these considerations, as well as from the authorities cited bearing directly upon the question, we think that the quality of alienability should be deemed to belong to this kind of property as it does to property in general. The only reason opposed to this is the technical one that the right grows out of, and, until severed, is incident to, a riparian estate. We have come to feel that this is unsatisfactory as a reason why such property should be deemed inseparable from the parent estate and incapable of a separate existence. If the right in question were created out of, or enjoyed at the expense of, some other estate or property, and were measured and limited by the needs or use peculiar to the riparian estate to which it is annexed, there would be ground for others to urge that the right could not be changed or transferred so as to enlarge the scope of a grant or contract, or so as to prejudice the party complaining. But no such considerations exist. The rights of no one are affected by allowing the riparian owner to convey away this part of his property as he may his other property. It is only an abstract question whether the right, originating in custom, and having originally attached as an incident to his riparian lands, may not be sold and conveyed, and be enjoyed by the purchaser. It is for the interest of the riparian owner that he be allowed



to dispose of or use his private property at his own discretion. It is for the interest of the public that such property be subject to purchase and use, where the owner may be incapable of improving it. No one is interested in opposing such unrestricted alienability and use." And this is now understood to be the settled law of that state.<sup>128</sup>

In Connecticut also it is held that the right enjoyed by the owner of upland adjoining flats on the border of an arm of the sea, over which flats the tide ebbs and flows, of wharfing out over the flats to the channel of the estuary, is not an inseparable incident to the title to the upland. And a conveyance of the upland will not necessarily convey the right of wharfage. And conversely, the right of wharfage may be conveyed separate and apart from the upland.<sup>129</sup> And a similar doctrine obtains in Oregon.<sup>130</sup> In one of the cases cited it was said: "We are aware that it is a general rule that what is appurtenant to land passes with it, being an incorporeal hereditament, but the right to build a wharf on the land of the state below high water is a franchise which attaches to the tide-land, and it is appurtenant to it, rather than to the adjacent land, for it can be severed from the adjacent land and enjoyed without it. The legislature has established the right of the adjacent owners to sell the right of wharfing on the adjoining tide-lands, by recognizing such sales and giving the owners thereof the preference to purchase."<sup>131</sup>

<sup>128</sup> *Gilbert v. Eldridge*, 47 Minn. 210, 49 N. W. Rep. 679; *Duluth v. Railway Co.*, (Minn.) 51 N. W. Rep. 1163; *Bradshaw v. Duluth Imperial Mill Co.*, (Minn.) 53 N. W. Rep. 1066.

<sup>129</sup> *Simons v. French*, 25 Conn. 346. See, also, *New Haven*

*Steamboat Co. v. Sargent*, 50 Conn. 199.

<sup>130</sup> *Parker v. Taylor*, 7 *Oreg.* 435; *Parker v. Rogers*, 8 *Oreg.* 183; *Parker v. West Coast Packing Co.*, 17 *Oreg.* 510, 21 *Pac. Rep.* 822.

<sup>131</sup> *Parker v. Rogers*, *supra*.

### § 255. Determination of boundaries as between adjoining owners.

When the property of two adjoining owners abuts on shallow water or tide-flats, and the shore-line is concave or otherwise irregular in its contour, it is sometimes a matter of difficulty to fix the proper division line between their interests in such flats. According to a late case in Wisconsin, the rule to determine the division line between adjoining holdings in the shallow waters of a navigable bay, of owners of land bordering thereon, and located on a cove, is as follows: (1) Measure the whole extent of the shore line and compute how many rods, yards, or feet each riparian proprietor owns thereon. (2) Divide the navigable water line into as many equal parts as such shore line contains rods, yards, or feet, and then appropriate to each proprietor as many of such parts of such navigable water line as he owns rods, yards, or feet of the shore line. (3) Draw a line from the point of division on the shore line to the point thus determined as the point of division on the navigable water line. Where the navigable water line and the shore line are elongated by deep indentations and sharp projections, the meander line, as located by the government survey, and the actual navigable water line should be discarded, and the general available shore line and the general trend of the navigable water line adopted.<sup>132</sup> In Michigan, as a solution of the same problem, the following formula is proposed: From the extreme points of the cove draw lines at right angles to the shore or meander lines meeting at such points, bisect the angles formed by such lines, and extend the bisecting lines to navigable water

<sup>132</sup> Northern Pine-Land Co. v. Pick, 45, and has since been Bigelow, (Wis.) 54 N. W. Rep. 496. This rule was first laid down in Deerfield v. Arms, 17 Pick. 45, and frequently followed. See, also, Tappan v. Boston Water-Power Co., (Mass.) 31 N. E. Rep. 703.

of, say, fifteen feet in depth. The points thus reached will be the head-lands of the cove. Connect the head-lands by a right line. Divide this line into as many equal parts as there are feet in the shore line between the two points of the cove, the shore line being divided into parts of a foot each. The proprietorship of the land-owners in the inclosed waters is shown by straight lines connecting the corresponding points of division, this rule being based on the assumption that the bisecting lines will reach navigable waters before they intersect.<sup>133</sup> In Connecticut, it is laid down that the division of a strip of seashore between adjoining proprietors of land projecting into the sea, whose title-papers fix definitely the division line of the upland, but not of the shore, should be made by a line running from the point of intersection between the division line of the upland and the high water line perpendicularly to the low water line.<sup>134</sup>

<sup>133</sup> Blodgett & Davis Lumber Co. v. Peters, 87 Mich. 498, 49 N. W. Rep. 917.      <sup>134</sup> Morris v. Beardsley, 54 Conn. 338, 8 Atl. Rep. 139.



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